

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
EASTERN DIVISION**

Civil Action No. 4:11-CV-00094-BO

BRUCE BANNISTER; MAX DUTTON;
and MARION TOWLES;

Towles,

vs.

WAL-MART STORES EAST, L.P.,

Defendant.

**APPENDIX TO DEFENDANT'S
MOTION FOR SUMMARY
JUDGMENT REGARDING MAX
DUTTON'S CLAIMS**

A

Max Dutton Deposition Transcript Excerpts

1 Q. Are you experiencing any problems that
2 might affect your ability to think or recall
3 information?

4 A. No.

5 Q. Are you on any medication?

6 A. Yes, I am.

7 Q. What medication are you on?

8 A. Gosh, I'm on two types of blood pressure
9 medicine, Lipitor, Cyzal.

10 Q. How do you spell Cyzal?

11 A. C-Y-Z-A-L. Proair, Advair, Cozart, and
12 I'm supposed to be on some other medications that I'm
13 not taking at this time.

14 Q. What medications are those?

15 A. My doctor wanted me to see a
16 psychologist and my funds did not permit that.

17 Q. Is that -- you stated that you're
18 supposed to be on other medication but you're not
19 taking it, what other medication have you been
20 prescribed that you're not taking?

21 A. I did not get prescribed but he wanted
22 me to go that direction.

23 Q. And you stated that your doctor wanted
24 you to see a psychiatrist but you don't have the
25 funds to do that; is that correct?

1 it's like a powder that comes out of a cylinder.

2 Q. And was that prescribed by Dr. Powell?

3 A. There again a combination of the three
4 doctors.

5 Q. And you don't recall when you began
6 taking Advair?

7 A. I want to say that could be in -- when I
8 first started having those symptoms '08, '09 maybe.
9 I can provide that record.

10 Q. To your knowledge does Advair affect
11 your memory?

12 A. No, it does not.

13 Q. To your knowledge does Advair affect
14 your ability to listen to questions and provide
15 truthful and complete answers?

16 A. No.

17 Q. Circling back to the issue of alleged
18 mold found at Wal-Mart, after Mr. Litchfield
19 allegedly told you to be quiet and toughen up did you
20 contact anybody else in Wal-Mart about the potential
21 mold problem?

22 A. I did not. I contacted a gentleman that
23 did -- that was a vendor for Wal-Mart to just look
24 into the duct work because a lot of associates in the
25 pharmacy area were complaining also.

1 Q. But that vendor is not a Wal-Mart
2 associate?

3 A. Not an associate, it. Was Providence
4 Electric but they didn't do just electric, they did
5 heat and air, electric, everything, and we did have
6 him come in and just check the vents in the pharmacy,
7 things like that. I told him make sure they're clean
8 but apparently that wasn't where the real problem
9 was. He did what I asked him to do.

10 Q. And what's that gentleman's name?

11 A. Pardon me?

12 Q. What was the vendor's name?

13 A. Providence Electric. The man's name is
14 Martin May, M-A-Y.

15 Q. And Martin May, when he came out and
16 looked at the store he didn't see any evidence of
17 mold?

18 A. Not really. He did some cleaning. He
19 did some cleaning and up in the vents of the pharmacy
20 because they were they were cleaning up there but no,
21 he did not do the whole store.

22 Q. Is Providence Electric an authorized
23 Wal-Mart vendor?

24 A. Yes, they are.

25 Q. Did you call the compliance hotline

1 about Mr. Litchfield's alleged action?

2 A. No, I did not.

3 Q. Did you contact the ethics hotline
4 regarding Mr. Litchfield's alleged actions in telling
5 you to be quiet about mold and toughen up?

6 A. No, I did not.

7 Q. Did you contact the regional compliance
8 manager regarding Mr. Litchfield's alleged actions in
9 telling you to be quiet about the mold and toughen
10 up?

11 A. No, I did not.

12 Q. Did you notify Wal-Mart's health and
13 wellness manager regarding what you believed to be a
14 mold problem?

15 A. No, I did not.

16 Q. Why did you not call any of those
17 individuals?

18 A. I'm trying to think who I did call but
19 it was mainly just to see if we could have the
20 building checked and I'm trying to think who I called
21 and that's when they told me to have Martin May who
22 is an approved vendor locally, he was Wal-Mart
23 approved, to come out and see what he could find
24 because right at that time the worst complaint that
25 was happening was up in the pharmacy area.

1 and I probably asked a hundred times what is going
2 on, what -- because I walked into the store that
3 morning and very arrogantly Eric Litchfield, Tracey
4 Battle and Dawana were at the front of the store with
5 their arms crossed.

6 That day we were having a special fundraiser for
7 Children's Hospital that had been planned because
8 we're in the -- we were always in the top 10 percent
9 per capita to raise money for Children's Hospital.
10 We were having what was called a beach day and I was
11 cooking for all the associates and that.

12 Instead, the associates see me being taken out
13 of the store and they said we're going do to an
14 investigation. I said fine, what can I help with. I
15 run a very good store. I said what may I help with.
16 They said nothing. Eric said no, you're going with
17 me, get in my car. And the next thing I know 200
18 miles plus later I'm back on the Outer Banks.

19 Q. Mr. Litchfield actually asked you to get
20 in the car with him, isn't that right?

21 A. I was told to get in the car.

22 Q. Did you tell Mr. Litchfield you didn't
23 want to get in the car?

24 A. No, because the strangest behavior I've
25 ever experienced in my adult life I thought well, I

1 guess if I don't I'll be terminated because something
2 is wrong anyways and I could feel it from the -- I
3 felt it from the beginning of June.

4 Q. Did Mr. Litchfield ever tell you that
5 you would be terminated if you didn't get in the car?

6 A. No, he didn't.

7 Q. Did anybody ever tell you you'd be
8 terminated if you didn't get in the car?

9 A. Not at that point, no.

10 Q. And not ever nobody told you if you
11 didn't get in the car you would be terminated?

12 A. Not associated with the car.

13 Q. So you go to lunch with Mr. Litchfield
14 in Elizabeth City. Did you complain or inform
15 anybody at the restaurant that Mr. Litchfield had
16 allegedly kidnapped you?

17 A. No, I did not.

18 Q. After lunch you went to visit a store in
19 Elizabeth City because Mr. Litchfield wanted to get
20 your thoughts as a long time Wal-Mart manager and
21 county commissioner, isn't that right?

22 A. That is not correct.

23 Q. You toured a store in Elizabeth City
24 with Mr. Litchfield?

25 A. I don't know that we even talked and he

1 went off in the store and I'm in that store knowing a
2 lot of associates and we were having a beach day
3 fundraiser. I'm in shorts and a Hawaiian shirt and
4 felt like a total idiot because I'm supposed to be
5 back at my store raising money for Children's
6 Hospital.

7 Q. But you didn't tour the store with
8 Mr. Litchfield, that's your testimony?

9 A. I want to say I walked through the back
10 room with him just because I wasn't sure what else I
11 was really supposed to be doing and had no reason
12 whatsoever why I would be in Elizabeth City.

13 Q. Did you tell anyone at the Wal-Mart in
14 Elizabeth City that Mr. Litchfield had kidnapped you
15 or was otherwise holding you against your will?

16 A. No, I did not, I was too embarrassed.

17 Q. So isn't it safe to say that the word
18 kidnapping doesn't accurately reflect what happened
19 with Mr. Litchfield on June 12th, you weren't held
20 against your will?

21 A. It was very awkward, very awkward and
22 when your supervisor tells you to do something you
23 usually follow that but once again, my adult life
24 I've never, ever experienced anything like that,
25 intimidating, bullied feeling. It was beyond

1 anything that's ever happened to me in my adult life.

2 Q. Mr. Litchfield didn't physically
3 threaten you in any way, correct?

4 A. No, no.

5 Q. Mr. Litchfield didn't say get in the car
6 or else?

7 A. He said get in the car.

8 Q. But he didn't say what would happen if
9 you didn't get in the car?

10 A. He did not.

11 Q. So again to say that you were kidnapped
12 and held against your will is not an accurate
13 reflection of what happened on June 12th, 2009?

14 A. When he drove to the first place which
15 was a Ben Franklin store in Nag's Head I was
16 contemplating because I only lived about a mile from
17 there just walking away and then in my thoughts and
18 you think about your family, you think about your
19 wife and kids, would I have been terminated, I'm sure
20 I would have been.

21 Q. But you could have walked away at that
22 time?

23 A. I could have, yes.

24 Q. And so again the use of the word -- what
25 do you believe kidnapping to mean?

25 A. It's approximately 63,000.

1 Q. Do you receive any bonuses?

2 A. Yes.

3 Q. Did you receive a bonus last year?

4 A. Yes.

5 Q. How much was that bonus?

6 A. In my tax return I could give you the
7 exact amount. I want to say around \$9,000.

8 Q. Any other bonuses that you receive at
9 Harris Teeter?

10 A. No.

11 Q. How many hours per week do you work?

12 A. Right now probably 65.

13 Q. Sounds pretty demanding.

14 A. It's very demanding.

15 Q. Do you believe you're a good performer
16 at Harris Teeter?

17 A. Yes, I do.

18 Q. Have good attendance?

19 A. Perfect.

20 Q. Do you feel like Harris Teeter treats
21 you well?

22 A. Yes.

23 Q. Have you been an assistant manager since
24 you were hired?

25 A. Yes.

1 Q. Great. You say that your schedule is
2 hectic due to the training through Harris Teeter, any
3 other scheduling obstacles or anything else that
4 makes your schedule hectic right now?

5 A. Well, right now I started a new bicycle
6 and pedestrian safety coalition and I've been
7 developing training tapes for Dare County and for the
8 State of North Carolina.

9 Q. How many hours a week does that
10 coalition take up of your time?

11 A. At least 30 minutes a day just with
12 phone calls, and then we just had an event which was
13 a about 5 p.m. to 8 p.m. event.

14 Q. And you'd say you're really involved in
15 that coalition?

16 A. Yes.

17 Q. What about the training tapes, how much
18 time a week do you spend on that?

19 A. When I made the training tapes my
20 segment was only, probably didn't last five minutes.

21 Q. We can switch.

22 THE VIDEOGRAPHER: The time is 10:11 and
23 we're going off the record.

24 (A brief recess was taken.)

25 THE VIDEOGRAPHER: We're back on the record

1 University or something like that?

2 A. Uh-huh.

3 Q. Other than that addition, the classes at
4 Harris Teeter, do you have anything else to add or
5 change to this resume?

6 A. As far as just work experience or
7 anything that's happened in my life?

8 Q. Anything.

9 A. I was elected as the Dare County
10 commissioner.

11 Q. When was that?

12 A. That was six years ago.

13 Q. Do you remember, would that have been
14 November 2006?

15 A. Yes.

16 Q. And you were publicly elected?

17 A. Yes.

18 Q. How long is that term?

19 A. Four years.

20 Q. So you -- were you re-elected then in
21 2010?

22 A. Yes.

23 Q. What kind of a time commitment is the
24 county commissioner position?

25 A. The first and third Monday of every

1 month are board meetings.

2 Q. How long do those last?

3 A. They can last anywhere from 2 hours to
4 12 hours.

5 Q. Aside from the first and third Monday of
6 every month, any other time commitments that the
7 county commissioner position requires?

8 A. Yes, I attend a board of education
9 meeting the second Tuesday of every month and it's
10 evening meetings.

11 Q. How long are those meetings?

12 A. Hour or two hours maximum.

13 Q. Do you do any other work for your county
14 commissioner position?

15 A. Yes, I'm on the East Carolina Behavioral
16 Health board. That meets the fourth Tuesday of every
17 other month and this last month was a meeting.

18 Q. How long are those meetings?

19 A. Three to four hours and they're an
20 evening meeting also.

21 Q. Any other commitments that the county
22 commissioner position accepts?

23 A. Yes, every other -- I'm sorry, the
24 fourth Thursday of every other month there's a
25 community development corporation board that I'm on.

1 And it meets from approximately 8:30 to 10:30 in the
2 morning.

3 Q. Any other commitments that you have for
4 the county commissioner position?

5 A. Just the new coalition that I started,
6 the bicycle pedestrian safety, because we had five
7 people killed last year and 50 injured.

8 Q. What's your -- do you have a position
9 with that coalition, like director or --

10 A. I'm the chairman.

11 Q. How many -- could you refresh my memory,
12 how many hours a week do you spend on that coalition?

13 A. We've had six meetings which last -- my
14 meetings last 59 minutes and that's only because the
15 schedule and I'm mindful of everyone's schedule
16 because I have a lot of very involved people and
17 they're police officers and firemen.

18 And then we had one event that was a 3-hour
19 event so nine hours just physically in meetings and
20 then I take phone calls of any kind of opportunities
21 there are and working with D.O.T. and perfecting
22 crosswalks and things.

23 Q. How many hours a month do you estimate
24 you spend on phone calls or in otherwise working on
25 county commissioner work that's not part of these

1 meetings?

2 A. The only time I return calls and things
3 is of course when I'm not engaged with my work
4 schedule. Everybody knows that either early, early
5 in the morning they can catch me or late, late at
6 night and it varies. I mean, it could be -- phone
7 calls could be one hour a week or five hours a week
8 but that's not during business hours. They're either
9 before or after business hours.

10 Q. Are you compensated for the county
11 commissioner position?

12 A. Yes, we get what's called -- it's more I
13 guess like a travel allowance just so your gas and
14 expenses are taken care of and it's approximately I
15 want to say like \$600 a month.

16 Q. Do you have records reflecting that
17 income?

18 A. Yes.

19 Q. Could you provide those to your attorney
20 to produce to us?

21 A. Certainly.

22 Q. When did you start your bicycle and
23 pedestrian safety coalition?

24 A. June 9th of this year.

25 Q. Of 2012?

1 A. '13.

2 Q. When did you start the coalition?

3 A. January 9th.

4 Q. January, okay, I thought you said -- I
5 heard June. I apologize.

6 MR. NANNEY: He said June, he made a
7 mistake.

8 MS. SHAH: Thank you.

9 BY MS. SHAH:

10 Q. So the county commissioner position
11 keeps you pretty busy?

12 A. (Nodding.)

13 Q. Do you enjoy your work on that?

14 A. Yes, for the good things we can get done
15 on that, yes.

16 Q. Have you had more time to devote to the
17 county commissioner position since you -- since your
18 employment with Wal-Mart ended?

19 A. Do I have more time to spend, I'm
20 sorry?

21 Q. Correct. Have you had more time to
22 devote to being county commissioner since your
23 employment with Wal-Mart ended?

24 A. No.

25 Q. Any other political or government

1 20th at 5:30 getting an email from Eric Litchfield
2 about your grocery experience; is that right?

3 A. It was 5:39, yes, ma'am.

4 Q. And that email occurred after you had
5 already submitted your notice of resignation, isn't
6 that right?

7 A. I would have to check those dates. I
8 want to say that was before.

9 Q. You had submitted your notice of
10 voluntary resignation on November 23rd, isn't that
11 right?

12 A. I have to check those dates.

13 Q. And according to your testimony you
14 submitted your notice of retirement so that you would
15 not be terminated; is that right?

16 A. I was going to be terminated, that's
17 correct.

18 Q. But so you chose to retire simply to
19 avoid being terminated; is that right?

20 A. Being forced out and I knew and even
21 being told the writing was on the wall, I knew it was
22 going to happen. I was pretty much told what was
23 going to happen. So yes, I could not stand that
24 embarrassment to let such a thing happen.

25 Q. Mark as Exhibit 3.

1 the awful year that I put up with I would actually be
2 able to receive my bonus if I made it to February 1st
3 and I wasn't about to not get that after the year
4 that I had put up with.

5 Q. You state in the letter that you are
6 quote, happy and content to end your career at the
7 store that supported you; is that correct?

8 A. I was very happy and loved every
9 associate in there, that's correct.

10 Q. You also stated that you'd be happy to
11 assist in any capacity following your retirement,
12 isn't that correct?

13 A. I made sure I made this very positive so
14 I wouldn't be fired before February 1st, that's
15 correct, and that was going to happen.

16 Q. But you have no proof that that was
17 going to happen, correct?

18 A. It was going to happen.

19 Q. But you have no proof that that was
20 going to happen, correct?

21 A. It all depends if harassment and
22 bullying and all is considered fact to what you're
23 asking me.

24 Q. You've -- when you use the term
25 harassment you are simply referring to what you

1 Video 2 in the deposition of Mr. Dutton. We're
2 on the record at 11:29.

3 BY MS. SHAH:

4 Q. Mr. Dutton, when did you have your lawn
5 care business?

6 A. That was the summer of 2010.

7 Q. Did you have it after the summer of
8 2010?

9 A. No, I mean I still have the equipment
10 and everything but not in use.

11 Q. You testified that you were depressed
12 after you left Wal-Mart. You've never received a
13 medical diagnosis of depression; is that right?

14 A. I don't think Dr. Mann ever put that in
15 my records. I know he wanted me to see someone but I
16 don't -- it could be in my records but --

17 Q. When you say your records, which
18 records --

19 A. My medical records.

20 Q. Your medical records from Dr. Mann?

21 A. That's correct, because he noticed I was
22 very depressed and I mean just, I don't know, wasn't
23 looking good.

24 Q. When did you see Dr. Mann regarding the
25 alleged depression?

1 Q. And you actually weren't terminated
2 after that below expectation PIP, isn't that right?

3 A. Because of my letter of retirement
4 before that occurred.

5 Q. How do you know that?

6 A. Just because of everything that
7 transpired. I knew they were trying to get me out of
8 the store in any way they could. They had a hard
9 time figuring out as you can see because it took 7
10 months of torture, bullying, threatening and I'm
11 going to be honest, my medical condition, I could not
12 take it anymore so I guess they won.

13 Q. But again nobody told you that they were
14 going to terminate you?

15 A. Different phrases.

16 Q. What different phrases were used?

17 A. The writing is on the wall.

18 Q. That phrase was used by --

19 A. I've got a bead on your head which is
20 very threatening.

21 Q. The writing is on the wall, that was
22 made by Noah Johnson, isn't that right?

23 A. That is correct.

24 Q. And that was after the -- an
25 investigation had uncovered that you had engaged in

1 policy violations, isn't that correct?

2 A. Repeat that, please.

3 Q. Mr. Johnson uttered that statement after
4 you had admitted to violating multiple company
5 policies, isn't that correct?

6 A. No, a policy.

7 Q. Which policy is that?

8 A. That is utilizing my key person which he
9 had used keys for 17 years, two managers prior to me
10 and was approved by Chris Mailer to have keys and
11 then when Eric, Mr. Litchfield, came to the market I
12 don't know that we ever got that approved but she had
13 always carried keys because of receiving. But yes,
14 did I say yes to her having keys and my sign-on for
15 me to operate a building that was not staffed, that
16 is totally correct.

17 Q. And those are actually two policies,
18 isn't that correct, the key and door -- the key and
19 door controls policy and the access control policy,
20 isn't that right?

21 A. That would be correct.

22 Q. And both of those policies allow for
23 discipline up to and including termination for
24 violations of those policies, isn't that correct?

25 A. That's a good question. I'm not sure.

1 I know any time that we've ever covered anything it's
2 been the coaching, Wal-Mart's corporate policy to
3 follow the coaching structure.

4 Q. And you -- when Mr. Johnson made that
5 comment to you in September of 2009; is that right?

6 A. That's correct.

7 Q. And you weren't actually terminated at
8 that time, isn't that right?

9 A. I was at a meeting in New Bern.

10 Q. You weren't terminated even a month
11 later, isn't that right?

12 A. That's correct.

13 Q. And in fact, instead of termination they
14 issued you a decision making day and a performance
15 improvement plan, isn't that correct?

16 A. That's correct.

17 Q. I'd like to mark as Exhibit 4. --
18 (Exhibit 4 was marked for identification.)

19 BY MS. SHAH:

20 Q. Mr. Dutton, have you seen this document?

21 A. Yes.

22 Q. Is this a copy of Wal-Mart's access
23 control policy?

24 A. Yes, it is.

25 Q. Is this -- to the best of your knowledge

1 is this a true and accurate copy of Wal-Mart's access
2 control policy?

3 A. As far as I know, yes.

4 Q. And this was in effect at least as of
5 April of 2009, isn't that correct?

6 A. Correct.

7 Q. And this policy on the second page under
8 user IDs and passwords states that each user is
9 responsible for safeguarding all of his or her user
10 IDs pursuant to the policy; is that right?

11 A. Yes.

12 Q. And that shared ID would be permitted
13 only if specifically approved in writing by
14 Wal-Mart's information systems division security
15 team, isn't that true?

16 A. I believe that's what it says.

17 Q. It also states that passwords for
18 individual user IDs must not be shared, displayed or
19 written down or stored in any location that will
20 allow -- it also states that passwords for individual
21 user IDs must not be shared, displayed or written
22 down and stored at any location that will allow
23 uncontrolled access to that password, isn't that
24 correct?

25 A. Yes, ma'am.

1 Q. It also states that passwords have to be
2 kept confidential, isn't that correct?

3 A. Yes, ma'am.

4 Q. It also states that usage of user IDs is
5 limited to activities specifically required to
6 perform your specific and authorized job function and
7 only to the extent your personal user ID does not
8 permit this level of access, isn't that correct?

9 A. Yes.

10 Q. Did you ever seek a waiver or permission
11 from the information systems division security team
12 for your invoice clerk to use your user name and
13 password?

14 A. No, I did not.

15 Q. It also states that any violation of the
16 policy may result in disciplinary action up to and
17 including termination, isn't that accurate?

18 A. Correct.

19 Q. And as a store manager you were charged
20 with familiarizing and knowing all of the company's
21 policies, isn't that right?

22 A. Uh-huh, yes.

23 Q. And serving as a leader for your
24 associates for best practices on policies, isn't that
25 correct?

1 Q. Did -- and Miss Shanefelter didn't ever
2 return the keys that she had in her possession, isn't
3 that true?

4 A. I don't believe she did for the entire
5 17 years, no.

6 Q. She never filled out any kind of log
7 about the keys that she had?

8 A. She had the keys, like I said, for the
9 entire time that store was there prior to me even
10 being store manager and helped run the building, not
11 necessarily the front or had alarm codes but
12 definitely the back door and yes, she did have keys.

13 Q. If you look on page 2 through 4 of the
14 policy do you see anywhere where the invoice clerk is
15 one of the authorized people listed to have keys?

16 A. No, I do not and of course, she acted as
17 a member of my management with not having being
18 staffed.

19 Q. But she was not member of your
20 management; is that correct?

21 A. For me she was, she did not have the
22 title.

23 Q. So it's your testimony that she
24 performed the duties of a salaried member of
25 management but was not compensated accordingly?

1 Q. And you understand that you have an
2 obligation -- you had an obligation to find
3 comparable employment after you left Wal-Mart, isn't
4 that right?

5 A. I wanted to, but was not able to.

6 Q. Why weren't you able to?

7 A. Because probably the state I was in.

8 Q. When you talk about the state you were
9 in you're talking about your belief that you were
10 depressed?

11 A. Not my belief, I was very severely
12 depressed and I just wasn't -- I wasn't coping well
13 with anything. I was just angry inside and this
14 whole segment of my life has been a total nightmare.

15 Q. How long did this alleged depression
16 last?

17 MR. NANNY: Object to the form, go ahead.

18 A. The depression is still today.

19 Q. And again you've never been medically
20 diagnosed with depression?

21 A. Just Dr. Robert Mann and the states he
22 has examined me really wanted me to get some
23 additional help but as I stated earlier, finances --
24 what all occurred did not permit that.

25 Q. So you've not been medically diagnosed

1 with depression?

2 A. No, other than he -- I mean medically I
3 would -- he knows that or I guess he wouldn't have
4 written me and contacted a person for me to see.

5 Q. Do you have a copy of that
6 correspondence from Dr. Mann?

7 MR. NANNY: Object to the form, go ahead.

8 A. I'm sure I do.

9 Q. Could you provide that to your attorney
10 so they could produce it to us, please?

11 A. Most definitely or I'll get it from
12 Dr. Mann himself.

13 Q. Have you done everything you can do to
14 limit or minimize your damages in this case?

15 A. I'm not sure I understand the question.

16 Q. What have you done to limit any monetary
17 damages that you claim you're owed, for example,
18 finding subsequent employment?

19 A. What have I done?

20 Q. Have you -- did you look for a job,
21 apply for positions other than Harris Teeter?

22 A. Oh, yes.

23 Q. Who did you apply with?

24 A. Target, K-Mart, of course Harris
25 Teeter. Gosh, who else. There was quite a few.

1 working and he would probably call me because he knew
2 I wasn't in a very good state of mind.

3 Q. How did he know you weren't in a good
4 state of mind?

5 A. Because he kind of -- he knew throughout
6 that 7 months what I was putting up with.

7 Q. He only knew from what you had told him,
8 isn't that correct?

9 A. That is correct.

10 Q. In November of 2010 you were re-elected
11 to the county commissioner position, isn't that
12 right?

13 A. Yes.

14 Q. Is there any campaigning that you did
15 for that position?

16 A. I did very little, thank goodness, and I
17 was running unopposed so I did not do a whole lot of
18 campaigning.

19 Q. Did you ever take any leave of absence
20 from your county commissioner post?

21 A. No.

22 Q. When you're not working at Harris Teeter
23 and when you weren't -- when you aren't fulfilling
24 county commissioner duties how do you spend your
25 personal time?

25 Q. Mark as Exhibit 6.

1 it your allegation that that was because of your age?

2 A. Yes, to remove me out of that store,
3 yes.

4 Q. So when you say threatened you're
5 referring to the alleged threats of termination?

6 A. Yes.

7 Q. Were you ever threatened with bodily
8 harm?

9 A. Just Mr. Litchfield made the comment
10 that a bead is on your head.

11 Q. When did Mr. Litchfield make that
12 comment?

13 A. That was on a conference call which was
14 heard by all the other store managers because I
15 received phone calls after that call.

16 Q. When was that call?

17 A. It was anywhere from April 2009 to June
18 or July 2009.

19 Q. What exactly did Mr. Litchfield say?

20 A. He just said as far as our -- well, it
21 was said several times but as far as our fundraising
22 practices and everybody better raise the amount of
23 money and there's a bead on your head and --

24 Q. How did you interpret there's a bead on
25 your head to mean?

1 to be terminated, right?

2 A. That's what it meant.

3 Q. And you weren't terminated at any time
4 during your employment, isn't that right?

5 A. That is correct.

6 Q. And instead you were told that instead
7 of termination you'd be issued a decision making day
8 and given a PIP, isn't that right?

9 A. That is correct.

10 Q. Did Mr. Johnson say anything having to
11 do with your age during that conversation?

12 A. No, he did not.

13 Q. And you stated that your store was
14 performing exceptionally at that time, that's your
15 own opinion, isn't that correct?

16 A. No, it was performing exceptionally
17 well.

18 Q. In your opinion it was performing
19 exceptionally well?

20 A. I had people tell me how great it as.

21 Q. Who told you how great it was?

22 A. Customers.

23 Q. Customers aren't familiar with
24 Wal-Mart's standards and expectations?

25 A. The associates, I had an 82 engagement

1 numerous occasions areas of opportunity for your
2 store, isn't that right?

3 A. Probably so.

4 Q. Who else -- what other store managers
5 allowed their -- any of their associates to have keys
6 to the store?

7 A. I wouldn't have knowledge of that.

8 Q. What other store managers do you know
9 who allow an invoice clerk or other hourly associate
10 to have their user name and password?

11 A. Greenville, North Carolina did it.

12 Q. Who was that store manager?

13 A. That was Turner Thompson.

14 Q. And Mr. Thompson is over 40; is that
15 correct?

16 A. I don't know his age.

17 Q. And he's now the store manager of Store
18 2000; is that correct?

19 A. That's correct. And also Ahoskie, North
20 Carolina Lynn Connor has had her manager sign on for
21 every store manager that's been there and I cannot
22 tell you how many years she had been there, it's been
23 a long, long time.

24 Q. When you were employed do you know who
25 the store manager of the Ahoskie store was?

25 A. By Mr. Litchfield.

1 Q. And she filed a complaint after her
2 resignation indicating that she believed that you had
3 harassed her or acted inappropriately towards her,
4 isn't that right?

5 A. No, I do not know that. If there's
6 something that was brought out it was never shared
7 with me.

8 Q. You were interviewed regarding a poster
9 that you made about Miss Moore, isn't that right?

10 A. Yes, that is correct.

11 Q. And on this poster that you had made you
12 stated I don't like protein, I want to be sick; is
13 that right?

14 A. That is correct.

15 Q. And you showed that poster to members of
16 management; is that right?

17 A. I showed it to Tonja.

18 Q. You didn't show it to anyone else?

19 A. I did not. She may have, I did not.

20 Q. If other people stated that you had
21 shown them the poster would they be lying?

22 MR. NANNEY: Object to the form, go ahead.

23 A. I don't know of anyone I showed it to
24 other than Tonja.

25 Q. Why did you make a poster of Tonja?

8 I helped her with all her studies at work to get
9 her through that, getting her promoted, you know. I
10 was concerned about everyone. Every meal that she
11 would eat, I know this probably sounds silly, would
12 be Fritos and Mountain Dew. And we, we and I'm
13 saying probably the whole management team would talk
14 to her about eating healthy because she always said
15 she didn't feel good.

21 But I don't want to say as a joke, just a wake
22 up was me making that picture in jest as they would
23 do with me, and I have a picture that I can show you,
24 a picture in jest to get her attention for her to eat
25 healthy and that's all I was trying to achieve and I

1 did only show it to her.

2 Q. Mark as Exhibit 7.

3 (Exhibit 7 was marked for identification.)

4 BY MS. SHAH:

5 Q. Mr. Dutton, you've been shown what's
6 been marked as Exhibit 7. Is this a copy of the
7 poster you made for Tonja?

8 A. Yes.

9 Q. How did she respond when you gave her
10 that?

11 A. She laughed as we all would when we did
12 this to each other. She laughed and first thing I
13 can remember she said, she says I've got to send my
14 mother a picture of this, and that was probably the
15 extent of it.

16 Q. Mark Exhibit 8.

17 (Exhibit 8 was marked for identification.)

18 BY MS. SHAH:

19 Q. Mr. Dutton, you've been shown what's
20 been marked as Exhibit 8. Is this a copy of the diet
21 plan that you referenced giving to Miss Moore?

22 A. Yes, this was one that was given to me
23 by the gentleman overnight that was bragging to all
24 of us about how great he feels now because he's been
25 following this so I started following it and at the

1 same time I also gave Tonja, I asked her if she would
2 just look at it and look at some of the things she
3 does enjoy eating because I told her Fritos and
4 Mountain Dews every day for your breakfast, lunch and
5 dinner is probably not on here.

6 Q. And you testified that she at first did
7 not want a copy of this; is that right?

8 A. I asked her if she wanted a copy. I
9 think it was pretty much a laughter thing and then I
10 said but it's a good diet, it's a healthy diet, and
11 then I think she took a copy and it was offered. I
12 didn't make her take the copy.

13 Q. Respect for the individual is very
14 important at Wal-Mart, isn't it?

15 A. Yes, it is.

16 Q. One of the three founding beliefs of the
17 company?

18 A. Yes, it is.

19 Q. Can you understand how Miss Moore would
20 have interpreted this as a lack of respect?

21 MR. NANNY: Object to the form, go ahead.

22 A. No, because we were always doing this
23 type thing to each other. As a matter of fact, I
24 have a picture of me that they did and I actually
25 have it with me, if you'd like to see it.

1 an assistant manager at Store 2000; is that right?

2 A. Yes, he was there for a short time also.

3 Q. Was he there in 2009?

4 A. Yes.

5 Q. So to go over your testimony you've
6 identified the following individuals who served as
7 assistant managers at least at some point in 2009
8 Clayton Saan, Prita Kalinidi, Elmo Reed, Tonja Moore,
9 Sammy Marriner, Chris Wetherington, Debra Beavers,
10 Tracy Hilton and Tony Taylor; is that right?

11 A. I would have to check the date but I
12 believe so.

13 Q. And that's nine individuals who served
14 as assistant managers at some point in 2009, isn't
15 that right?

16 A. That sounds correct.

17 Q. And in fact, at least three of them were
18 hired after you complained to Mr. Litchfield in June
19 of 2009, Chris Wetherington, Elmer Reed and Prita
20 Kalinindi, isn't that right?

21 A. They sent me some new people I think
22 right out of the program, yes.

23 Q. So how do you calculate that you only
24 had two assistant managers?

25 A. That was in January until this time

1 frame which I would have to look at the dates, maybe
2 July. I'd have to look at the dates.

3 Q. So you are saying from January 2009
4 until July 2009?

5 A. Or June.

6 Q. Or June is when you had only two people,
7 correct? Is that your testimony?

8 A. That sounds correct.

9 Q. Even though Tony Taylor was there from
10 at least April 2008 until you testified some point in
11 2009, Tracy Helton was hired in April of 2009
12 according to your testimony, Debra Beavers was there
13 in part of 2009 though only a short time, you had
14 Sammy Marriner. Tonja Moore was there until the
15 spring of 2009 starting in April 2008, and then
16 Clayton Saan who started in approximately 2008 and
17 was there in 2009, so again, I mean, that is five
18 individuals that I'm counting; is that incorrect?

19 A. That's probably correct. I would have
20 to check the dates once again and I know when I put
21 it out there that with restructuring my sales I was
22 able to have one comanager which they changed the
23 name to shift manager and six assistants.

24 Q. You actually didn't qualify for a
25 comanager though because you didn't have the

1 necessary 65 million in sales for a comanager, isn't
2 that right?

3 A. I had 60.

4 Q. Right, and the requirement for a
5 comanager, it starts at \$65 million stores, isn't
6 that right?

7 A. That I can't answer. I know I was told
8 and I can't remember who it was that I qualify for a
9 comanager.

10 Q. Were Sammy Marriner and Tracy Helton,
11 did they -- how many days a week did they work?

12 A. How many what?

13 Q. Days a week did they work?

14 A. At that time I want to say Sam went to
15 four day a week but I don't know if they could
16 because of the short staffing. They were supposed to
17 be on a schedule of four days on but I don't know
18 that I was able to do that.

19 Q. Were all your assistant managers full
20 time?

21 A. Yes.

22 Q. So when you said that you had only two
23 assistant managers during this time period that might
24 be incorrect, isn't that right?

25 A. No.

1 Center now?

2 A. Not yet, it's in the process.

3 Q. It's being staffed as a Super Center
4 right now to prepare for when it becomes a Super
5 Center, isn't that right?

6 A. Yes, but the February after I left and
7 even in that year there was nine assistants.

8 Q. And after you complained to
9 Mr. Litchfield in June of 2009 the store hired three
10 assistant managers that year, isn't that correct?

11 A. I believe so.

12 Q. So what evidence do you have that any
13 alleged under staffing occurred because of your age?

14 A. I think everything occurred because of
15 my age.

16 Q. What evidence do you have to support
17 that the alleged under staffing which I am not
18 contending exists but the alleged under staffing
19 occurred because of your age because you asked for
20 more staffing, you got more staffing, isn't that
21 right?

22 A. As time went on, yes some came, some
23 left.

24 Q. But you were given -- three assistant
25 managers were hired after you talked to Eric

1 Litchfield about it. So what evidence do you have
2 that any management, any staffing was withheld
3 because of your age?

4 A. I'm not sure.

5 Q. As you sit here today you're not aware
6 of any evidence that any staffing issues occurred
7 because of your age?

8 MR. NANNEY: Objection, go ahead.

9 A. It was being there was -- there was a
10 mission to get me out of that store and as far as
11 staffing, I don't know if I can answer that right now
12 but I'll be able to.

13 Q. What would assist you with being able to
14 answer that question?

15 A. Just some time to think and look at the
16 dates that I'll have to look up.

17 Q. What dates would help you determine
18 whether any decisions were made because of your age?

19 A. The entire 7-month investigation and I
20 hope I'm answering this and maybe I'm not. I know it
21 had to do with my age because older managers were
22 being eliminated just like the ones that I know of.
23 I haven't talked to some of them, a couple of them I
24 have. I said Bruce Bannister and Marion, the older
25 ones are gone and they allowed themselves to be

1 record at 12:57.

2 (A luncheon recess was taken.)

3 THE VIDEOGRAPHER: Start of Video 3 and
4 we're on the record at 1:49.

5 BY MS. SHAH:

6 Q. Mr. Dutton, I want to show you what I
7 will mark as exhibit 9.

8 (Exhibit 9 was marked for identification.)

9 BY MS. SHAH:

10 Q. Mr. Dutton, do you recognize this
11 document?

12 A. Yes.

13 Q. What is this?

14 A. This is an application to Wal-Mart.

15 Q. And this is your application to
16 Wal-Mart; is that correct?

17 A. Yes.

18 Q. Is this an accurate copy of your
19 application with Wal-Mart?

20 A. Yes.

21 Q. Is everything stated on the application
22 true and correct?

23 A. Yes.

24 Q. You were hired in at Wal-Mart in 1993;
25 is that correct?

1 A. Actually in 1992 with a -- in November
2 but a start date because of other obligations until
3 February I want to say 17th.

4 Q. Of 1993?

5 A. Yes.

6 Q. And you were hired as an assistant
7 manager; is that right?

8 A. Yes, that's correct.

9 Q. And you were promoted to a store manager
10 position in 1996; is that correct?

11 A. Yes.

12 Q. And that was to the Kitty Hawk store?

13 A. Yes.

14 Q. Show you what I will mark as Exhibit 10.
15 (Exhibit 10 was marked for identification.)

16 BY MS. SHAH:

17 Q. Mr. Dutton, I've shown you what's been
18 marked as Exhibit 10. Do you recognize this
19 document?

20 A. Yes.

21 Q. What is this?

22 A. It is a job description and it looks
23 like a pay scale.

24 Q. So that would have been the score, this
25 would have applied to your position as the store

1 manager over Store 2000; is that correct?

2 A. Yes, yes.

3 Q. Does this document accurately reflect
4 your job duties and responsibilities?

5 A. Yes.

6 Q. And these duties are Wal-Mart's
7 expectations of their store managers; is that right?

8 A. That's correct.

9 Q. So if a store manager isn't fulfilling
10 the duties listed on here they're not meeting
11 Wal-Mart's expectations; is that correct?

12 MR. NANNEY: Object to the form, go ahead.

13 A. That's correct.

14 Q. In 2009 Wal-Mart relaunched its IMS
15 program; is that correct?

16 A. Yes.

17 Q. And so placed more of an emphasis on
18 back room structures, inventory to make sure that
19 inventory processes run more smoothly, is that
20 accurate?

21 A. That's correct.

22 Q. I want to direct your attention to your
23 or the complaint in this lawsuit which has already
24 been marked as Exhibit 6 and specifically I want to
25 direct your attention to pages 9 and 10 of the

1 complaint, paragraphs 33 through 41. This complaint
2 references Wal-Mart's coaching for improvement in
3 paragraphs 33 to 41; is that correct?

4 A. Yes.

5 Q. What does the term coaching mean?

6 A. Coaching is when you're trying to make
7 someone successful and you start -- of course, the
8 coaching process of Wal-Mart is first a verbal so you
9 explain to someone what exactly they have an
10 opportunity on and how you can help them improve and
11 then of course if it does not improve then you take
12 them to a written and try to get them convinced of
13 the proper way and then next to decision, a decision
14 making day and you try, if you're trying to make
15 someone successful you try to help them to figure out
16 how to get better at what they're going.

17 Q. And as a store manager you would have
18 instructed your salaried members of management to use
19 the coaching process if someone wasn't performing
20 their jobs or wasn't meeting their expectations; is
21 that right?

22 A. That's correct.

23 Q. And the Wal-Mart coaching for
24 improvement policy contemplates that under certain
25 circumstances levels in the coaching process can be

1 skipped; is that correct?

2 A. I've never seen that happen. I have
3 with me, but I haven't seen that a happen with anyone
4 else.

5 Q. I'd like to mark Exhibit 11.

6 (Exhibit 11 was marked for identification.)

7 BY MS. SHAH:

8 Q. Mr. Dutton, do you recognize what's been
9 marked as Exhibit 11?

10 A. Coaching for Improvement.

11 Q. And this is Wal-Mart's policy on the
12 coaching for improvement; is that right?

13 A. That's correct.

14 Q. And is this a true and accurate copy of
15 the coaching for improvement policy as you understood
16 it during your employment?

17 A. Yes.

18 Q. The policy contemplates that, and you
19 may not have seen it, but the policy contemplates
20 that levels of coaching can be skipped for the
21 behavior and misconduct at issue, isn't that right?
22 For example page 2 under guidelines for administering
23 the coaching for improvement process, Number 4?

24 A. That's what it says on this sheet, yes.

25 Q. And it even -- the policy even

1 contemplates that there could be some situations
2 where you don't have to use the coaching process at
3 all and immediate termination can occur; is that
4 right?

5 A. If something is -- yes, uh-huh.

6 Q. For example, and the policy classifies
7 that immediately terminable offenses as gross
8 misconduct, is that accurate?

9 A. Yes.

10 Q. And examples of gross misconduct under
11 the policy include inappropriate conduct or rude and
12 abusive conduct towards an associate; is that
13 correct?

14 A. Yes.

15 Q. And also includes situations where a
16 salaried member of management either directed, knew
17 or should have known that an hourly associate worked
18 without being properly compensated; is that correct?

19 A. Yes.

20 Q. And so in those situations Wal-Mart
21 policy allows that a manager doesn't even need to go
22 through coaching, can just immediately terminate the
23 violator; is that correct?

24 A. Yes.

25 Q. The coaching for improvement policy also

1 contemplates that investigations will occur as part
2 of the coaching process that maybe would lead to a
3 coaching; is that correct?

4 A. Yes.

5 Q. And under Wal-Mart policy the company
6 really wants to ensure a complete review of the facts
7 and time for proper consideration of appropriate
8 disciplinary action; is that correct?

9 A. Yes.

10 Q. And the policy also contemplates that an
11 associate who is under investigation might be
12 suspended without pay if the circumstances so
13 warrant; is that right?

14 A. Yes.

15 Q. In the complaint you state that you had
16 never been -- you had never before received a
17 coaching; is that right?

18 A. That is correct.

19 Q. Mark as Exhibit 12.

20 (Exhibit 12 was marked for identification.)

21 BY MS. SHAH:

22 Q. Do you recognize this document that's
23 been marked as Exhibit 12?

24 A. I've never seen this before.

25 Q. Did you -- under action plan do you see

25 A. No, it does not.

1 Q. No level of coaching affects pay; is
2 that right?

3 A. No.

4 Q. And a coaching isn't a demotion?

5 A. No, it's just to help you be successful.

6 Q. And so it doesn't -- a coaching doesn't
7 change job responsibilities or a title?

8 A. No.

9 Q. There are no permanent effects on
10 employment when given a coaching?

11 A. Permanent effects, no, not unless it's a
12 termination for theft or something that would be
13 gross misconduct.

14 Q. And you received performance evaluations
15 during your employment; is that correct?

16 A. That is correct.

17 Q. I'm going to just show you a series of
18 evaluations, Exhibit 13.

19 (Exhibit 13 was marked for identification.)

20 BY MS. SHAH:

21 Q. Do you recognize this document?

22 A. Yes, it's a performance evaluation.

23 Q. And the review period is January 2006
24 to -- February 2006 to January 2007?

25 A. Yes.

1 Q. And this is a review from Mr. May; is
2 that correct?

3 A. Yes.

4 Q. And on the last page, is that your
5 signature next to the date of April 12, 2007?

6 A. Yes.

7 Q. And you received a copy of this
8 evaluation?

9 A. Yes, I'm sure I did.

10 Q. Show you what's marked as Exhibit 14.

11 (Exhibit 14 was marked for identification.)

12 BY MS. SHAH:

13 Q. Mr. Dutton, do you recognize what's been
14 marked as Exhibit 14?

15 A. Yes.

16 Q. Is this a copy of a performance
17 evaluation you would have received in April of 2008
18 from Tim Jackson?

19 A. Yes.

20 Q. And is that your signature on the last
21 page?

22 A. Yes, it is.

23 Q. And you were rated exceeds expectations
24 on this evaluation; is that right?

25 A. Yes, that's correct.

1 Q. Who is Tim Jackson's supervisor at this
2 time?

3 A. I believe it was David Carmon or it
4 could have been Lance de la Rosa.

5 Q. I'll show you what we'll mark as Exhibit
6 15.

7 (Exhibit 15 was marked for identification.)

8 BY MS. SHAH:

9 Q. Mr. Dutton, do you recognize what's been
10 marked as Exhibit 15?

11 A. Yes, it's a 2009 performance evaluation.

12 Q. Who gave you this evaluation?

13 A. This is my 2009. I believe it was done
14 on June 10th in Little Washington at a meeting.
15 Absolutely nothing was filled out whatsoever. It was
16 a blank form. I was asked to sign this form and
17 Noah -- Mr. Johnson and Mr. Litchfield talked to me
18 about the company.

19 Q. So who gave you this evaluation?

20 A. Mr. Noah Johnson and Mr. Eric Litchfield
21 and it was a blank form when I signed the form with
22 nothing on it.

23 Q. The comments on the last page that have
24 been typed under strengths and opportunities, is it
25 your testimony that those comments, strengths and

1 individual I know as I told you was in the room
2 hearing this, and then also when Penny who currently
3 works at Petsmart mentioned to me that essentially
4 the old guard has got to go and Wal-Mart needs to
5 have the new face and that terminology started
6 getting used by different individuals that they call
7 it the old guard and the new face of Wal-Mart and
8 they were looking for new and younger people.

9 Q. Motion to strike for non responsive.
10 What evidence do you have that Eric Litchfield read
11 or knew about the memorandum identified in
12 Interrogatory Number 15 in your complaint?

13 A. And please repeat that, I'm sorry.

14 Q. Do you have any evidence that Eric
15 Litchfield ever read or relied on the memorandum
16 identified in Interrogatory Number 15?

17 A. I'm not actually sure what
18 Mr. Litchfield knows or what he's --

19 Q. Had you ever read this memorandum while
20 you were employed with Wal-Mart?

21 A. I have not.

22 Q. When you were an associate at Wal-Mart
23 anyone ever mention this memorandum to you?

24 A. Yes, I want to say Ronnie Toms.

25 Q. What did Ronnie Toms tell you about the

1 memorandum?

2 A. Just pretty much how their reduction of
3 management was talked about and I don't know if he
4 got that from upper management friends or what but
5 he, Ronnie Toms, had also made a comment that
6 something about I think something about the old guard
7 but there's going to be a new face of Wal-Mart, in
8 other words, going after younger associates for -- to
9 be managers.

10 Q. Is it your testimony that Ronnie Toms
11 was stating that this memorandum set forth that
12 strategy?

13 A. I'm just saying that's what was told.
14 He didn't initiate it or anything, he was repeating.

15 Q. But was Ronnie Toms referencing this
16 memorandum when he was talking to you about that?

17 A. He knew all about -- he mentioned Susan
18 Chambers and I don't know if he mentioned he read it
19 and he was just telling me of it.

20 Q. You were never given a directive during
21 your employment to discharge your older workers; is
22 that right?

23 A. No, I was not, as a matter of fact, I
24 hired older workers.

25 Q. What evidence do you have that Art

1 Binder read the Chambers memo?

2 A. I'm sorry?

3 Q. What evidence do you have that Art

4 Binder read the memorandum that's referenced in

5 Interrogatory Number 15?

6 A. I don't know what Art Binder has read.

7 Q. And so you don't know if Noah Johnson

8 ever read the Chambers memorandum?

9 A. I don't know that factually, no.

10 Q. And you don't know if David Carmon read

11 the Chambers memorandum?

12 A. I do not.

13 Q. And you don't know if Tracey Battle read

14 the Chambers memorandum?

15 A. I do not.

16 Q. Ever told to take any actions against

17 older workers?

18 A. No.

19 Q. Do you have any evidence that the

20 Wal-Mart board of directors adopted anything from the

21 Chambers memo?

22 A. I do not.

23 Q. And the memorandum that's referenced in

24 your complaint in Interrogatory Number 15 is from

25 2005; is that correct?

1 A. Yes.

2 Q. And you were -- you retired or left the
3 employment of Wal-Mart approximately five years
4 later; is that correct?

5 A. February of 2010.

6 Q. And you had received exceeds
7 expectations performance evaluations and solid
8 performance evaluations ratings after 2005; is that
9 correct?

10 A. Yes, ma'am.

11 Q. Any evidence that Eric Litchfield relied
12 on the Chambers memorandum in any way in issuing you
13 a decision making day or a PIP?

14 MR. NANNEY: Objection, go ahead.

15 A. I'm really not sure what Mr. Litchfield
16 was thinking or reacting to.

17 Q. Do you know who made the decision to
18 issue you a decision making day and a PIP?

19 A. Are you asking me or who was all
20 involved or --

21 Q. Sitting here today do you know who was
22 involved in the decision to extend -- to offer you --
23 strike that -- to issue you a decision day coaching
24 and a PIP?

25 A. David Carmon.

1 Q. How do you know that David Carmon was
2 involved in issuing you the decision day and the PIP?

3 A. Because he came to the Kitty Hawk
4 Wal-Mart in November of 2009 along with Noah Johnson
5 and Art Binder and was somewhat rude to me in my
6 office. And prior to that he said gosh, store looks
7 great, everything is wonderful, this is great, we're
8 going to put a close to this hundred year
9 investigation. He said he couldn't believe it went
10 on this long.

11 And then he -- I don't know, we went to the back
12 office and at that point he said I was going to get a
13 decision making day.

14 Q. And he told you that he could have
15 terminated you but was issuing you a decision day
16 instead; is that correct?

17 A. Got very vocal, very verbal and said you
18 know I could, very loud and I won't be like that, I
19 can terminate you right now if I want.

20 Q. But he told you that he wasn't going to
21 be terminating you, that you would be receiving a
22 decision day and a PIP; is that correct?

23 A. That is correct.

24 Q. Who else do you contend played any role
25 in your receiving a decision day and a PIP?

1 Max. So that was very demeaning, it got a chuckle, I
2 mean, out of everybody but it was very demeaning.

3 Q. But you testified earlier that you
4 worked in a joking environment where you would joke
5 with people about what they ate and not being healthy
6 and how they looked, isn't that correct?

7 A. That part's correct, yes.

8 Q. So isn't it possible that Eric
9 Litchfield was also if he ever said that just joking
10 along with people?

11 A. It wasn't in a joking -- let's put it
12 this way, for my life it wasn't in a joke -- a time
13 to be joking so yes, it was very demeaning.

14 Q. So Mr. Litchfield allegedly made one
15 comment regarding you being old enough to remember
16 Christmas candy --

17 A. Ribbon Christmas candy.

18 Q. Ribbon Christmas candy. Did
19 Mr. Litchfield ever make any other comments about
20 your age?

21 A. The only thing when he initially got
22 there he said you've been here a long time.

23 Q. Well, you had been there a long time,
24 right? You'd been there 16, 17 years?

25 A. That's correct.

1 Q. That had nothing to do with your age; is
2 that correct?

3 A. Not my age, maybe.

4 Q. Did Art Binder, Noah Johnson or David
5 Carmon ever make any comments about your age?

6 A. No.

7 Q. So sitting here today it's only your
8 speculation that you were treated differently because
9 of your age?

10 MR. NANNEY: Objection, go ahead.

11 A. That's all I can figure it was with my
12 record and what I've done for Wal-Mart that's all it
13 can -- I can't figure what else it would be.

14 Q. I'd like to show you what we'll mark as
15 Exhibit 18 -- 19, I apologize.

16 (Exhibit 19 was marked for identification.)

17 BY MS. SHAH:

18 Q. Mr. Dutton, do you recognize this
19 document?

20 A. Yes.

21 Q. What is it?

22 A. Once again, I guess I always called it
23 the discovery which a lot of times with the legal
24 jargon I had a hard time understanding.

25 Q. It is indeed. This is a -- your

1 documents but they were kept for myself, I was trying
2 to do better, and I don't know if there's anything in
3 there I need to submit or not.

4 Q. What I would ask is that following this
5 deposition you, and I know I can't order you to
6 discuss anything with your attorney, but if you could
7 review those with just yourself or Mr. Nanney and
8 make sure that you've given us everything that you
9 would state that you've given us.

10 I know we have discussed a number of documents
11 that you have. For example, there are documents that
12 are requested regarding your performance,
13 evaluations, any other employment related matters
14 that I believe would cover what we've discussed
15 today.

16 Then also direct your attention, this also
17 includes but is not limited to Defendant's request
18 for production number 20 regarding documents you
19 might use to compute damages which could include your
20 pay stubs from Harris Teeter and any other employer
21 that you've had, your tax returns as requested in
22 request number 22, your -- any other documents
23 regarding income as requested in request number 25,
24 to the extent you have any documents regarding which
25 positions you applied or interviewed for with

1 like that, just a call to see how you doing.

2 Q. Did -- what have you and Mr. Bannister
3 discussed about the theory of your case without legal
4 counsel present?

5 A. Probably the only thing that we shared
6 is we just -- you just have to stop and look what
7 you've done for years and years and then that's gone
8 and it's -- it really plays on you. And other than
9 that, facts or anything like that, we probably never
10 even got into -- just a very wrongful doing is
11 probably the extent of the conversation and just kind
12 of disbelief that it even occurred.

13 Q. And Miss Towles and Mr. Bannister were
14 both discharged by Wal-Mart; is that correct?

15 A. That's what I understand.

16 Q. And is it your understanding that they
17 were discharged for performance reasons?

18 A. I didn't really get into -- to that with
19 them.

20 Q. You were trained on Wal-Mart's policies
21 and procedures, isn't that correct?

22 A. There was constant training all the time
23 on everything, yes.

24 Q. I show you what I'll mark as Exhibit
25 20.

1 (Exhibit 20 was marked for identification.)

2 BY MS. SHAH:

3 Q. Do you recognize this document,
4 Mr. Dutton?

5 A. Yes.

6 Q. What is this?

7 A. It's the training, you know, that you
8 take throughout your essentially career and it's
9 constant training on a lot of things.

10 Q. And this is a five page record of all
11 the trainings that you took; is that right?

12 A. That's correct. I never printed one but
13 I know it was a lot of training.

14 Q. You were trained that as a manager you
15 were supposed to be a servant leader; is that
16 correct?

17 A. That is correct.

18 Q. And specifically that you were supposed
19 to lead by example?

20 A. Yes, ma'am.

21 Q. And part of your job as a store manager
22 was to know and familiarize yourself with all
23 Wal-Mart policies; is that right?

24 A. Yes.

25 Q. And you were trained about Wal-Mart's

1 open door policy, both how to use it and how to
2 manage it; is that correct?

3 A. Yes.

4 Q. And you were trained about Wal-Mart's
5 discrimination and harassment prevention policy, both
6 how to use it and how to manage it; is that correct?

7 A. Yes.

8 Q. Same goes for Wal-Mart's statement of
9 ethics, you were trained about how to use it and how
10 to manage it; is that correct?

11 A. Correct.

12 Q. As the store management you were the
13 highest level of management within that store; is
14 that right?

15 A. That's right.

16 Q. And in that position you were
17 responsible for ensuring compliance with Wal-Mart's
18 policies and procedures; is that correct?

19 A. Uh-huh.

20 Q. And you were trained about the resources
21 within the company that were available to you to
22 ensure compliance with those policies; is that right?

23 A. Yes.

24 Q. Under the open door policy you were
25 supposed to listen to any open door complaints that

1 you received from an associate; is that right?

2 A. That's correct.

3 Q. And you knew that if you had an issue
4 you could use the open door policy if you have any
5 problems with your employment?

6 A. As I did, yes.

7 Q. And you could call the ethics hotline
8 anonymously if you needed?

9 A. (Nodding.)

10 Q. Is that a yes?

11 A. Yes. I'm sorry.

12 Q. No, you're doing great with that. And
13 you're aware that Wal-Mart had a non retaliation
14 policy with people who used the open door; is that
15 right?

16 A. Yes.

17 Q. And it was part of your job to ensure
18 that any open door complaint that you received was
19 either resolved by you or referred to somebody else
20 to resolve; is that right?

21 A. That's correct.

22 Q. Are you aware that there were associates
23 who complained that you had not listened to their
24 open door requests?

25 A. No.

1 Q. Did you ever tell a cashier named Maxine
2 that she would be fired if she ever complained again
3 about someone named Terry Collins?

4 A. Absolutely not.

5 Q. You were informed with regard to
6 Wal-Mart's discrimination and harassment prevention
7 policy that if you became aware of complaint of
8 discrimination or harassment, you had to assure that
9 it was addressed or relayed to be addressed promptly;
10 is that correct?

11 A. Yes.

12 Q. And a failure to report a claim of
13 discrimination or harassment would subject you to
14 disciplinary action; is that right?

15 A. Yes. If you didn't take care of
16 business, yes.

17 Q. And the same is true regarding the open
18 door policy that if you got an open door and you
19 didn't resolve it or ensure that somebody else did
20 that you could be subjected to disciplinary action?

21 A. Uh-huh.

22 Q. And Wal-Mart's policy states that it
23 doesn't tolerate any type of discrimination or
24 harassment based on age; is that correct?

25 A. That's correct.

1 Q. And the company, Wal-Mart, expects that
2 investigation related information be revealed only on
3 a-need-to-know basis; is that correct?

4 A. If you'll repeat that, please.

5 Q. Wal-Mart's expectations for
6 investigations is that any information gathered
7 during that process be revealed only on a-need-to-
8 know basis; is that right?

9 A. Yes.

10 Q. So investigations are supposed to be
11 kept confidential?

12 A. Oh, most definitely, yes.

13 Q. And the reason for that is to facilitate
14 the investigation and ensure that had there are no
15 opportunities for retaliation or gossip, those sorts
16 of things about it; is that correct?

17 A. Yes.

18 Q. And it's to ensure that the company can
19 do what it needs to gather the facts to determine
20 whether it can substantiate or not substantiate the
21 allegations; is that right?

22 A. Yes.

23 Q. And the Wal-Mart policy states that a
24 breach of con -- strike that. Wal-Mart policy states
25 that a breach of confidentiality may be used as gross

1 misconduct resulting in disciplinary action up to and
2 including termination; is that right?

3 A. Yes.

4 Q. And as we discussed earlier you were
5 informed about Wal-Mart's three basic beliefs; is
6 that right?

7 A. That's correct.

8 Q. And those are the respect for the
9 individual, service to customers and strive for
10 excellence; is that right?

11 A. Most definitely.

12 Q. What does respect for the individual
13 mean?

14 A. It means that everyone is to be
15 respected as you would want to be respected and our
16 store was over and beyond as far as respecting each
17 other.

18 Q. And you understood that Wal-Mart
19 operated its business with those three basic beliefs
20 always at the foremost; is that right?

21 A. Most definitely, most definitely.

22 Q. And as a salaried member of management
23 you were required to demonstrate respect for the
24 individuals maybe above and beyond what an hourly
25 associate would be required?

1 A. Definitely.

2 Q. And you understood that failing to
3 demonstrate respect for the individual would subject
4 you to disciplinary action; is that right?

5 A. Most definitely.

6 Q. And you were required as a store manager
7 to immediately raise concerns you might have about
8 requests or acts that would violate Wal-Mart's
9 statement of ethics or any other Wal-Mart policy; is
10 that right?

11 A. Yes.

12 Q. And it was your understanding -- strike
13 that. Under the statement of ethics when there's a
14 conflict between ethics and business objectives is it
15 your understanding ethics always have to come first?

16 A. Most definitely, ethics and respect,
17 yes.

18 Q. And the statement of ethics make clear
19 that disciplinary action up to and including
20 termination can result for violations of the
21 statement of ethics; is that right?

22 A. Yes.

23 Q. Show you what I will mark as Exhibit 21.

24 (Exhibit 21 was marked for identification.)

25 BY MS. SHAH:

1 Q. Do you recognize this document?

2 A. Yes.

3 Q. What is this document?

4 A. It is open door communication policy.

5 Q. And is this a copy of the open door
6 communication policy as you understood it during your
7 employment?

8 A. Yes, I don't know that I ever printed it
9 off but we've had it in several classes.

10 Q. And it's always -- and Wal-Mart's
11 policies are available on the Wire too; is that
12 correct?

13 A. That's correct.

14 Q. And the Wire is Wal-Mart intranet?

15 A. Uh-huh.

16 Q. I'd like to mark Exhibit -- I will do 22
17 first.

18 (Exhibit 22 was marked for identification.)

19 BY MS. SHAH:

20 Q. What is -- do you recognize Exhibit 22?

21 A. It says it's the discrimination and
22 harassment prevention policy.

23 Q. And according to the face of this
24 document this is the one in effect on July 22nd,
25 2008; is that right?

1 prevention policy in effect November 21, 2009?

2 A. That's what it says, yes.

3 Q. Show you what I'll mark as Exhibit 24.

4 (Exhibit 24 was marked for identification.)

5 BY MS. SHAH:

6 Q. And do you recognize this document?

7 A. The statement of of ethics.

8 Q. Is this to the best of your knowledge a
9 true and correct copy of the statement of ethics?

10 A. To the best of my knowledge.

11 Q. And you were required as a store manager
12 to comply with this at all times; is that right?

13 A. Yes, that's correct.

14 Q. Did you ever refer to this during your
15 employment, review it, read it, familiarize yourself
16 with it?

17 A. I know I was in classes about it but
18 like to print it off or read it or sit and read it,
19 no. If there was an opportunity you would go to it
20 and maybe use it as a reference.

21 Q. We can take a break now.

22 THE VIDEOGRAPHER: Going off the record at
23 2:53.

24 (Discussion off the record.)

25 THE VIDEOGRAPHER: On the record at 3:04.

1 BY MS. SHAH:

2 Q. Mr. Dutton, Wal-Mart encourages
3 charitable giving and contributions; is that right?

4 A. Yes, ma'am.

5 Q. And the company gives its stores goals
6 to meet for donations to charities; is that right?

7 A. That's correct.

8 Q. But there are no actions taken against a
9 store or its associates if the store fails to meet
10 that giving goal; is that right?

11 A. That's correct.

12 Q. And there are policies that govern and
13 dictate charitable contributions and giving; is that
14 correct?

15 A. Yes.

16 Q. In 2008 and/or 2009 you directed
17 subordinates to solicit vendors for donations; is
18 that right?

19 A. We put and I say we, we were all trying
20 to see how we could raise the most money for
21 Children's Hospital and we've done this in the past
22 and actually directed to do this but not this
23 particular time. And all's we did is ask for
24 donations. We had cookouts, we had different raffles
25 going on essentially like we did in the past.

1 Q. And when you say ask for donations, that
2 includes soliciting vendors to ask them to donate
3 money to Children's Hospital or Children's Miracle
4 Network; is that right?

5 A. My understanding there was a sign put up
6 in receiving about that and that was taken down.

7 Q. When was it put up?

8 A. I can't tell you the exact date. I
9 didn't make the sign. I didn't put it up, but the
10 associates, a very aggressive group always wanted to
11 kind of fight to be number one. They had a lot of,
12 you know, very competitive nature.

13 Q. When did the sign get taken down?

14 A. As far as I know immediately after it
15 went up.

16 Q. Did you ever see the sign?

17 A. I did not.

18 Q. You directed Teresa Shanefelter to draft
19 the sign, isn't that right?

20 A. I don't recall that. Not to my
21 recollection.

22 Q. Mark Exhibit 25.

23 (Exhibit 25 was marked for identification.)

24 BY MS. SHAH:

25 Q. Is the document that's been marked as

1 very same thing, the associates wanted to do
2 everything they could to meet a goal.

3 Q. Isn't it your responsibility as the
4 store manager to make sure that associates are
5 adhering to company policy?

6 A. Yes.

7 Q. And you never told any associates that
8 they couldn't solicit vendors for donations for
9 charity?

10 A. I want to say the sign came down
11 immediately.

12 Q. But you didn't take the sign down?

13 A. I did not take the sign down, no.

14 Q. And the sign violates Wal-Mart policy,
15 isn't that right?

16 A. Yes, and in my past I was instructed to
17 do it by a district manager Wayne Lewis.

18 Q. What was his name again?

19 A. Wayne Lewis.

20 Q. When was Wayne Lewis a district manager?

21 A. Not sure the years. I would have to do
22 some research.

23 Q. Before 2004?

24 A. Could have been in that time frame.

25 Q. Eric Litchfield never told you that you

1 could solicit vendors for donations for charity, did
2 he?

3 A. No, just we were told to do whatever we
4 had to do to meet a goal.

5 Q. Did you ever ask for clarification about
6 that?

7 A. No, I did not.

8 Q. Eric Litchfield never gave you any
9 instruction that it would be okay to violate any
10 Wal-Mart policy for any reason; is that right?

11 A. That wasn't said like that, correct.

12 Q. Mark as Exhibit 26.

13 (Exhibit 26 was marked for identification.)

14 BY MS. SHAH:

15 Q. Do you recognize what's been marked as
16 Exhibit 26?

17 A. A volunteerism and charitable
18 contribution.

19 Q. And is this -- have you ever seen this
20 document before?

21 A. Not like this I haven't.

22 Q. But you were familiar with the policy
23 from your role as a store manager; is that right?

24 A. Yes.

25 Q. And on the second page under supplier

1 participation and or contributions suppliers are
2 prohibited from being solicited for donations and
3 from giving any money directly or on behalf of
4 Wal-Mart to a charity; is that right? Let me phrase
5 that, I apologize.

6 A. Okay.

7 Q. This policy prohibits associates from
8 soliciting suppliers for charitable donations for
9 Wal-Mart's behalf; is that right?

10 A. I'm sure that's what it says, yes.

11 Q. And this policy also prohibits a
12 supplier giving money directly to Wal-Mart for a
13 charity; is that right?

14 A. They always did it for 17 years.

15 Q. But the policy still prohibits it, isn't
16 that right?

17 A. Yes, I know even one check that we got
18 was for a gentleman that is -- his son had brain
19 surgery with CHKD at birth and thank goodness, his
20 son is I want to say 10 or 12 years old now and he
21 would always contribute.

22 Q. You told Diane Harris on June 9th of
23 2009 that she had to call vendors and ask for money;
24 is that right?

25 A. No, that is not correct. Do we know,

1 Q. Do you know what this document is?

2 A. Is this from George Marshall? It's one
3 of my -- Maria in my accounting office came and told
4 me she received a \$500 check.

5 Q. Have you ever seen this document before?

6 A. Marie brought it to me and said you know
7 we received a \$500 check from George Marshall and I
8 was rather shocked and the next time I saw him he
9 said he was up front and told the story once again of
10 his son and felt compelled to do so. I didn't in no
11 means make him do this.

12 Q. How would vendors know about Wal-Mart's
13 charity drive if associates didn't tell them?

14 A. Pretty much year 'round for 17 years, I
15 mean for 17 years we would, prior to me even being
16 store manager we fund raised for Children's Hospital
17 all year long from dress down day to beach day to oh,
18 gosh, just a hundred different ways of constantly
19 raising money for the hospital and that's how we
20 ended up being in the top ten per capita fundraising
21 stores for Children's Hospital.

22 Q. Art Glidden is a non Wal-Mart employee
23 who you allowed to come inside the store, work
24 several hours and raise money for Children's Miracle
25 Network on behalf of Wal-Mart, isn't that correct?

1 A. Yes, but I may add he --

2 Q. There's no question pending.

3 MR. NANNEY: He's entitled to explain his
4 answer.

5 A. Yes, he did. Prior to the Kitty Hawk
6 Wal-Mart store being built, him and the store manager
7 at that time John Birch got a relationship and I mean
8 his relationship as far as a fundraising we're going
9 to make Wal-Mart number one in the community fund
10 raise and they started this even before the store was
11 open with the associates fundraising. And then it
12 turned right into a 17-year -- while I was there the
13 same thing occurred for 17 years.

14 Q. And you never stopped Mr. Glidden from
15 coming into the store; is that correct?

16 A. That's correct. I mean we had certain
17 times he would come and then certain times he
18 wouldn't, but the majority of the year we were doing
19 some type of fundraising.

20 Q. So how often would Mr. Glidden come into
21 the store to help Wal-Mart raise money for Children's
22 Miracle Network?

23 A. Over the 17 years?

24 Q. Yes.

25 A. All the time, I mean.

1 Q. Once a month, once a week?

2 A. He received a golden -- Governor's Gold
3 Leaf Award for volunteerism. It wasn't just
4 Children's Hospital at our location. Outside of our
5 location he raised money for Joy Fund. I mean,
6 that's what he did in the community is raise money
7 for charitable events.

8 Q. Motion to strike as nonresponsive.

9 How often did Mr. Glidden come to Store 2000 to
10 help the company raise money for Children's Miracle
11 Network?

12 A. I mean do you want days? I'm not sure
13 what you're asking. He did it for 17 years.

14 Q. Right, but once a week, once a month
15 would he come in, once every few months?

16 A. He may not come in for two weeks and
17 then he might come in the next week every day.

18 Q. And Mr. Glidden would sit inside the
19 store; is that right?

20 A. That's correct.

21 Q. Typically in front of women's apparel I
22 think it was?

23 A. That's correct.

24 Q. And on multiple occasions he would be
25 wearing Wal-Mart attire; is that right?

3 Q. But you admitted to the EEOC that
4 Mr. Glidden would come in dressed in Wal-Mart attire;
5 is that correct?

13 Q. So he did wear Wal-Mart attire, correct?

15 Q. In fact, again you admitted to the EEOC
16 that he came dressed in Wal-Mart attire?

18 Q. But that's Wal-Mart's dress code, isn't
19 that correct?

21 Q. And in fact, Mr. Glidden also wore a
22 Wal-Mart name tag, isn't that correct?

24 Q. But you never took away that Wal-Mart

25 name tag; is that correct?

5 Q. But you never took Mr. Glidden's name
6 tag away even though he wasn't a Wal-Mart associate?

11 Q. Did you send associates to pick up Art
12 Glidden when he would come to the store?

16 Q. And those associates weren't reimbursed
17 for the mileage that they spent going to pick up
18 Mr. Glidden, isn't that right?

20 Q. And as a store manager you were required
21 to comply with all applicable federal, state and
22 local wage and hour laws; is that right?

24 Q. And failure to comply with wage and hour
25 laws is a pretty serious offense for Wal-Mart, is it

1 not?

2 A. It would be, yes.

3 Q. And so that's something that would be
4 grounds termination; is that right?

5 A. I would think so.

6 Q. And you're aware -- are you aware that
7 Wal-Mart ended up having to pay Mr. Glidden for time
8 worked due to his time spent in the store?

9 A. I am not, no.

10 Q. Did -- Mr. Glidden had his own charity,
11 the Joy Fund, isn't that what you said?

12 A. That's correct.

13 Q. Was that a 501(c)3?

14 A. As far as I know, yes. I never checked
15 on what he did outside of Wal-Mart.

16 Q. Did he ever come into the store to
17 solicit for his Joy Fund?

18 A. No, he -- him and his firemen did that
19 but it was usually we followed the corporate policy
20 of them being 20 or 25 feet away from the front door
21 and they would usually have a fire boot and a fireman
22 there in his uniform.

23 Q. Ever tell Art Glidden that he could have
24 half of the money that he raised for Children's
25 Miracle Network?

1 Q. That's just your speculation though; is
2 that correct?

3 A. Yes, that would be my speculation.

4 Q. Did Mr. Glidden -- Mr. Glidden came to
5 the store to sell raffle tickets for Wal-Mart and
6 collect money for Children's Miracle Network, isn't
7 that right?

8 A. Yes.

9 Q. And the raffle was for a \$500 shopping
10 spree; is that right?

11 A. I think we did several of those
12 throughout the years.

13 Q. Mark at Exhibit 29.

14 (Exhibit 29 was marked for identification.)

15 BY MS. SHAH:

16 Q. Do you recognize this document?

17 A. Yes.

18 0. And this is -- what is this?

19 A. It's a document to do a \$500 Wal-Mart
20 shopping spree with all proceeds going to Children's
21 Hospital.

22 Q. You were told that it was against
23 company policy to do raffles, isn't that correct?

24 A. No, I did exactly what I was -- had been
25 doing for the last 17 years.

1 Q. And raffles actually violate PD 72,
2 prizes and awards, isn't that right?

3 A. If that's what it states.

4 Q. Art Glidden's caretaker actually won
5 this raffle, isn't that right?

6 A. I was told that after the fact, yes.

7 Q. And you don't know who did the drawing
8 for that raffle?

9 A. I do not.

10 Q. And you admitted when questioned about
11 the raffle that it wouldn't happen again; is that
12 right?

13 A. If for the years that we did raffles and
14 even prior to managers to me that if they didn't want
15 us to do them, yes, it would not happen again.

16 Q. That's because it violates company
17 policy, isn't that right?

18 A. And there again I was following what I
19 did for 17 years but if that's what the policy
20 states.

21 Q. If Mr. Glidden was working -- was
22 dressed as a Wal-Mart associate, had a Wal-Mart badge
23 and was working to collect the money on behalf of
24 Wal-Mart for Children's Miracle Network wouldn't that
25 be a wage and hour problem?

1 BY MS. SHAH:

2 Q. Do you recognize this document?

3 A. Yes, I do.

4 Q. Is this a statement that you wrote on
5 July 14, 2009?

6 A. Yes, it is.

7 Q. And in this statement you claim that Art
8 Glidden had been involved in CMN fundraisers for the
9 past 11 years; is that right?

10 A. Yes.

11 Q. And you testified a moment ago that it
12 was actually much longer than 11 years, at least 17
13 years; is that right?

14 A. That is correct, it was 17 years.

15 Q. So this letter is incorrect in that
16 aspect; is that correct?

17 A. In the years, yes.

18 Q. You admit halfway down in the paragraph
19 beginning one day on an email that one morning at
20 morning meeting it was brought up if we could put a
21 sign up for truck drivers or anyone coming in the
22 back if they would like to donate to CMN, do you
23 remember that?

24 A. I remember everybody one was throwing
25 out ideas.

1 Q. Did you tell whoever brought that up
2 that that was against company policy?

3 A. I did not.

4 Q. And it's your job as a leader to advise
5 people of what appropriate company policy would be;
6 is that right?

7 A. That's correct, but I was also --
8 whenever with Wal-Mart you were told do whatever it
9 takes and I've been told that in the past, we always
10 did whatever it took to achieve a goal.

11 Q. But the statement of ethics says that
12 when ethics and business conflict that ethics wins,
13 isn't that right?

14 A. Correct.

15 Q. So in this situation it would be
16 understood that the ethics of how to handle this
17 should win over raising the money for CMN, isn't that
18 correct?

19 A. Yes.

20 Q. And so as a leader you were responsible
21 for telling the associates they can't do that, that
22 ethically that's prohibited by the statement of
23 ethics, isn't that right?

24 A. Yes.

25 Q. I'd like to mark 31 -- 32.

24 Q. Are you aware that complaints were made
25 by multiple associates that you held female assistant

1 is one that occurred in June of -- June 12th of 2009;
2 is that correct?

3 A. Yes, ma'am.

4 Q. And that was prompted by associate
5 complaints, was it not?

6 A. As I'm guess I'm learning now that would
7 be a complaint from Tonja.

8 Q. Was that your understanding before
9 today?

10 A. No. I mean I knew, I could never figure
11 it out but I figured that no one ever shared any of
12 that with me.

13 Q. And if -- and they wouldn't have shared
14 that with you under the requirements for
15 confidentiality; is that correct?

16 A. That's correct.

17 Q. And it's part and parcel of Wal-Mart's
18 policies and foundation of beliefs that if an
19 associate were to complain even about a store manager
20 that the company should look into it and investigate
21 it, isn't that right?

22 A. Most definitely.

23 Q. Wouldn't it be reasonable for the
24 subject of the investigation to not be present when
25 the investigation is occurring?

1 individual defendant in this, have you?

2 MR. NANNEY: We'll stipulate that he is
3 not.

4 MS. SHAH: An individual defendant?

5 MR. NANNEY: (Nodding.)

6 BY MS. SHAH:

7 Q. During your car ride with Mr. Litchfield
8 you guys talked about Andy Griffith, didn't you?

9 A. I've talked to a lot of people about
10 Andy Griffith, we may have that day. It's been a
11 while ago.

12 Q. You had some pleasant conversations with
13 Mr. Litchfield that day?

14 A. To try to get past what was occurring,
15 probably.

16 Q. And you had your cell phone with you
17 that day, did you not?

18 A. I'm not sure.

19 Q. In fact, you used your cell phone on
20 that day, is that right, during your drive with
21 Mr. Litchfield?

22 A. I'm going to be honest, that day is a
23 haze. I'm not sure if I did or did not.

24 Q. Which policy did Mr. Litchfield violate
25 by taking you on the car right to lunch and then to

1 tour the Elizabeth City store?

2 MR. NANNEY: Objection.

3 A. What did he violate?

4 Q. Which policy.

5 A. Probably not a Wal-Mart policy. I don't
6 know that that's ever been a practice of a Wal-Mart
7 district manager to take someone out of their store
8 against their will.

9 Q. And during that drive Mr. Litchfield
10 never physically threatened you, correct?

11 A. No.

12 Q. Never physically touched you?

13 A. No.

14 Q. And you testified that you told Bill
15 Simon about the car ride, who else did you tell about
16 the car ride?

17 A. At this time I can't remember. I know I
18 put it in my statement that you have.

19 Q. Which statement?

20 A. Well, what I submitted in these papers.
21 I know I -- it was mentioned that I was taken out of
22 the store.

23 Q. What did Mr. Litch -- strike that. Why
24 did you believe that Mr. Litchfield was taking you on
25 a drive because of your age?

2 Q. And you admitted to Mr. Litchfield, Miss
3 battle and the market asset protection manager
4 Dawana -- that you gave Teresa Shanefelter some keys
5 to the store; is that right?

7 A. Yes, and she had them for a long time
8 before me.

12 A. No, she is a viable member of my team.

15 A. That's my understanding, yes.

19 A. That's correct.

22 A. During that time everything that was
23 going on I didn't know what to think. I absolutely
24 did not know what to think, so no, that -- the whole
25 situation I open doored and attempted to open door

1 Mr. Litchfield and Dawana and Tracey is getting ready
2 to leave and I was told if I discuss any of "this"
3 because I remember saying may I ask what "this" is
4 because I did not know and they said if you ask you
5 talk about "this" and I still said what's "this" and
6 they said you'll be terminated.

7 Q. And the investigation policy that we
8 discussed earlier calls for discipline up to and
9 including termination if the confidentiality of the
10 investigation is compromised in any way, isn't that
11 right?

12 A. Yes.

13 Q. And you have no evidence that they made
14 the comment about being terminated if you disclosed
15 this because of your age, isn't that right?

16 MR. NANNEY: Objection, go ahead.

17 A. Please repeat that.

18 Q. You have no evidence that Miss Battle,
19 Mr. Riddick or Mr. Litchfield made the comment to you
20 that you could be terminated for violating
21 confidentiality because of your age, isn't that
22 right?

23 A. That wasn't said but I was treated very
24 differently.

25 Q. But you have no evidence that you were

1 treated differently that day because of your age?

2 MR. NANNEY: Objection.

3 A. I don't know what else it was.

4 Q. But you don't have any evidence to
5 support that it was your age?

6 A. I'm not sure.

7 Q. Okay.

8 THE VIDEOGRAPHER: That concludes Video 3
9 and we're off the record at 4 o'clock.

10 (A brief recess was taken.)

11 THE VIDEOGRAPHER: Start of Video 4 in the
12 deposition of Mr. Dutton. On the record at
13 4:10.

14 BY MS. SHAH:

15 Q. Mr. Dutton, in -- on July 14 of 2009 Art
16 Binder came and spoke with you regarding the
17 allegations concerning Art Glidden and the Children's
18 Miracle Network, isn't that right?

19 A. Yes.

20 Q. And Mr. Binder's position at the time
21 was regional asset protection manager?

22 A. Yes.

23 Q. And in that position he was charged with
24 protecting the assets of the company; is that right?

25 A. Yes.

3 A. He did at first. He said I know this
4 investigation has taken way too long and he said I'm
5 going to try to make sure it's done within the week
6 which of course did not happen.

13 Q. And when you say the first statement,
14 which statement was the first one that you were
15 referring to, which exhibit?

22 Q. You had no -- you have no evidence that
23 Mr. Binder came and spoke with you because of your
24 age; is that right?

25 A. That's correct.

1 of her investigation?

2 A. No, just to do more communication with
3 the associates and there was one point throughout
4 everything that said I was communicating with my
5 associates too much so it was kind of --

6 Q. She never said any part in the
7 investigation had to do with your age?

8 A. No, she did not. She just did make the
9 statement that something is definitely wrong, someone
10 is out to get you and if I were you -- why don't you
11 come to Myrtle Beach because you run a great store.

12 Q. But she never said anything that
13 somebody was out to get you because of your age?

14 A. No, she did not make that statement.

15 Q. Would you be surprised to know that she
16 found numerous areas of concern and policy violations
17 as result as a result her investigation?

18 A. Yes, I would.

19 Q. For example, would it surprise you to
20 learn that she found the policy had been violated
21 when you had corrected Teresa Shanefelter's time and
22 not done that for other people?

23 A. Correct her time?

24 Q. Yes.

25 A. In reference to what? I'm not what

1 Q. Did he ever tell you who was out to get
2 you?

3 A. No, she just said some -- something --
4 she said something in your market team is not right.
5 She said someone is out to get you. If I were you I
6 would transfer to Myrtle Beach.

7 Q. On September 8, 2009 is when you had the
8 store market manager meeting where you spoke with
9 Noah Johnson and Art Binder; is that right?

10 A. They spoke to me, yes.

11 Q. And when they pulled you to the back of
12 the hotel was that not out of a concern to keep their
13 discussion with you confidential?

14 A. I don't know. It was a very harassing
15 moment because Noah was raising his voice, said you
16 know I don't want to be here so I was like -- and at
17 that time I still didn't know what was going on. I'm
18 like what in the world.

19 Q. And when you say harassing you're
20 talking about him raising his voice and threatening
21 you with termination?

22 A. Kind of as if any two people was walking
23 down the sidewalk and one is raising their voice and
24 yes.

25 Q. But again no comments about your age

1 were made?

2 A. No.

3 Q. Nothing led you to believe that he was
4 raising his voice at you or threatening you with
5 termination because of your age?

6 A. No.

7 Q. And Mr. Johnson didn't physically
8 threaten you?

9 A. No.

10 Q. Did you provide Mr. Johnson or
11 Mr. Binder with names of managers who had violated
12 similar policies that you had?

13 A. I believe I had. I knew several people
14 that did the same thing to run their business.

15 Q. Who were these individuals? Before I
16 believe you only identified two individuals, one is
17 Turner Thompson and that was just regarding the user
18 name and password, if I'm not mistaken. And then the
19 other was the store manager in the Ahoskie store and
20 that was also just regarding the user name and the
21 password. What other -- what other individuals are
22 you aware of who violated the access control or key
23 and door controls policy?

24 A. Mr. Litchfield.

25 Q. How so?

24 A. Access controls I don't think she did
25 but I think Mr. Litchfield, Tracey Battle and Dawana

1 Riddick.

2 Q. But again you testified that you don't
3 know if market assistants are authorized to obtain
4 the user names and passwords of their market team
5 members, right?

6 A. I don't think I've ever seen that
7 written anywhere.

8 Q. But you don't know one way or the other?

9 A. No, I do not.

10 Q. So you don't know one way or the other
11 if Eric Litchfield, Miss Battle or Mr. Riddick
12 violated the access controls policy?

13 A. I'm not sure.

14 Q. Aside from those individuals who you've
15 identified, anybody else who you believe violated the
16 access control policy or the key and door control
17 policy?

18 A. Not at this time.

19 Q. So who did you tell Noah Johnson and Art
20 Binder had violated those policies?

21 A. I don't think I told them anyone. I
22 just said that -- I asked for consistency search to
23 be done because I know I was not the only one doing
24 that to operate your store to best of your ability.

25 Q. Aside from Noah Johnson and Art Binder

1 did anyone else witness your conversation with them?

2 A. No, no, like I said, it was a Mafia
3 setting. It was very strange.

4 Q. Did you report the event to anyone?

5 A. At that point I didn't know who to
6 report anything to.

7 Q. Is that a yes or no?

8 A. No.

9 Q. Why not call ethics hotline?

10 A. I was still in my mind just baffled and
11 trying to figure out what in the world is going on
12 and I didn't know what -- initially using that open
13 door policy and getting nowhere and essentially
14 getting lied to that he didn't know Mr. Litchfield
15 even though they eat breakfast on Saturdays I thought
16 where else can I go that someone is going to tell me
17 the truth and that's how I felt at that point.

18 Q. Why not try the ethics hotline and
19 see -- that's another avenue, is it not, for lodging
20 complaints?

21 A. The way I was being treated I didn't
22 feel that anybody at that point was going to be of
23 help to me because I've tried.

24 Q. But that was just your belief, right?

25 A. No, that's what was happening.

1 Q. And during that conversation with
2 Mr. Johnson and Mr. Binder nothing about your age was
3 said, right?

4 A. No.

5 Q. On September 10th, 2009 you filed an
6 open door complaint, isn't that correct?

7 A. If I go back through my records, yes.

8 Q. Mark as Exhibit 35.

9 (Exhibit 35 was marked for identification.)

10 BY MS. SHAH:

11 Q. Do you recognize this document?

12 A. Yes.

13 Q. And this is an email that you sent to
14 Eduardo Castro-Wright, Mike Duke, Bill Simon, Mike
15 Moore and David Carmon and Tom Heid; is that correct?

16 A. Yes, that's correct.

17 Q. And you don't state anywhere in this
18 document that it's your belief that any action has
19 been taken because of your age; is that right?

20 A. Because of my age, at that point I
21 definitely felt like that, yes.

22 Q. But where do you say I believe this has
23 happened because of my age?

24 A. In the last section.

25 Q. Where?

1 Q. And does this refresh your recollection
2 from when you would have met with Mr. Magiver?

3 A. I'm trying to recall, did I write this
4 when I was with him? This is definitely my writing,
5 but --

6 Q. It's dated October 14th, correct?

7 A. Yeah, and I can't recall.

8 Q. You didn't meet with him during your
9 leave of absence, right?

10 A. I don't believe so, no.

11 Q. So this probably would have been made
12 sometime within a couple of days after the
13 investigation with Mr. Magiver, correct?

14 A. If those dates match, yes.

15 Q. And in this letter to Mr. Magiver you
16 don't make any reference to any kind of harassment or
17 hostile work environment, do you?

18 A. I didn't know who it was so no, I did
19 not.

20 Q. Mr. Magiver didn't tell you that he was
21 a market human resources manager?

22 A. No, I knew that, but I knew when he was
23 at Mr. Litchfield's office before he met with me I
24 figured what the roll out there was going to be.

25 Q. Wouldn't it be common for Mr. Magiver to

1 want to speak with the individual who you are
2 accusing of disparate treatment?

3 A. Yes.

4 Q. Do you know who you sent Exhibit 39 to?

5 A. I did so many of these I don't recall.

6 Q. As you testified earlier you met on
7 November 9th with David Carmon, Noah Johnson and Art
8 Binder in the store; is that correct?

9 A. Yes.

10 Q. And at no time during your meeting with
11 them did Mr. Carmon, Mr. Johnson or Mr. Binder make
12 any comments to you about your or anybody else's age,
13 correct?

14 A. No, I just got treated very differently.

15 Q. And in fact, Mr. Carmon, Mr. Johnson and
16 Mr. Binder none of them ever made any comment that
17 you're aware of regarding your age or anyone else's
18 age, right?

19 A. No.

20 Q. Let's like to mark Exhibit 40.

21 (Exhibit 40 was marked for identification.)

22 BY MS. SHAH:

23 Q. Do you recognize this document?

24 A. Online coaching.

25 Q. This is a copy of the decision making

1 document or I knew I would have been terminated
2 that's the one I did.

3 Q. On that document did you write any
4 disagreements or disputes with the coaching?

5 A. I'm sure I probably did.

6 Q. But you don't have a copy of that
7 document?

8 A. Probably at home in my file.

9 Q. I will ask you to go through your files
10 and look for them because we have not seen a copy of
11 that document yet and it's critical.

12 A. But it would be the same one that
13 Mr. Litchfield would have had because I was told to
14 sign that in his presence which I did because him and
15 Tracey Battle were there.

16 Q. In the observations of associate's
17 behavior and performance there are at least four
18 policies that are the noted as having been violated,
19 isn't it that correct?

20 A. What is that, I'm sorry?

21 Q. In the observations of associate's
22 behavior and or performance section there are at
23 least four policy violations mentioned; is that
24 correct?

25 A. Yes, that's what's on here, yes.

1 Q. And you've already admitted to me today
2 that you violated the access control and key and door
3 control policy and the statement of ethics, isn't
4 that true?

5 A. From the very first start the password
6 and the keys yes, with Teresa Shanefelter, and I did
7 fundraising the same way for 17 years as I was
8 taught.

9 Q. It was still a violation of company
10 policy, was it not?

11 A. Then this would be correct.

12 Q. Mark as Exhibit 41.

13 (Exhibit 41 was marked for identification.)

14 BY MS. SHAH:

15 Q. Do you recognize this document?

16 A. Yes.

17 Q. What is this?

18 A. Let me refresh my memory. I guess this
19 would kind of be like a plan of action.

20 Q. And if you compare it with the -- with
21 Exhibit 40 under the action plan it's the same
22 wording, is it not?

23 A. Yes.

24 Q. And in the action plan you don't dispute
25 any portion of your coaching, isn't that right?

25 Q. And you didn't lose your position as a

1 store manager?

2 A. No.

3 Q. Didn't lose any of your
4 responsibilities?

5 A. No.

6 Q. Didn't -- and you didn't apply for any
7 other positions following your decision day; is that
8 right?

9 A. Apply for any other positions?

10 Q. Positions, right.

11 A. Within Wal-Mart?

12 Q. Right.

13 A. No.

14 Q. You ever ask anyone if you could
15 transfer away from Mr. Litchfield's market?

16 A. Yes.

17 Q. Who did you ask?

18 A. District manager Chris Mailer.

19 Q. When?

20 A. When I knew that what was going on and
21 he knew my capabilities where they weren't
22 appreciated where I was and the way I was being
23 treated so he said why don't you move here. And then
24 I wanted to rescind my resignation and I was told by
25 Mr. Litchfield that that was not going to happen and

1 get you because of your age?

2 A. No.

3 Q. I'm going to show you what I'll mark as
4 Exhibit 42.

5 (Exhibit 42 was marked for identification.)

6 BY MS. SHAH:

7 Q. Actually, going back to Exhibit 41, your
8 action plan, you state that you have enjoyed your 16
9 year, 9 month career; is that correct?

10 A. Yes.

11 Q. Why would you state that you've enjoyed
12 it if you're feeling harassed and bullied?

13 A. Because I'm trying to keep my job to get
14 to February 1st.

15 Q. Why February 1st?

16 A. Because I figured I was going to be
17 terminated before February 1st and at that point I
18 would have lost my bonus.

19 Q. And you weren't actually terminated
20 before February 1st, right?

21 A. No, because I put my resignation in so
22 I'm sure they said good, we got rid of him so let's
23 let him fly until February 1st.

24 Q. That's just your speculation?

25 A. Speculation but I would say truth.

1 Q. Again, that's just your subjective
2 belief that they were trying to get rid of you,
3 right?

4 A. Yes.

5 Q. Do you recognize what's been marked as
6 Exhibit 42?

7 A. Yes, this is the copy that I got with my
8 performance with my PIP.

9 Q. Is this the document that you were
10 referring to before that you signed?

11 A. Yes, that's correct.

12 Q. Okay. So it is possible that you did
13 review an electronic coaching and then this PIP in a
14 hard copy that you signed; is that right?

15 A. Yes, a lot of that was a blur, I'm going
16 to be honest with you.

17 Q. Okay. And you didn't note on your
18 associate comments the last page, you don't dispute
19 the grounds for the PIP; is that correct?

20 A. Signing this document if I would have, I
21 would have been terminated so it would not be the
22 right thing to do.

23 Q. You would have been terminated if you
24 stated in the comments that you believed it was
25 discriminatory?

1 Q. Uh-huh, what's the impact on your
2 employment of a PIP?

3 A. What a PIP is is a personal improvement
4 plan. It is what it is.

5 Q. And so Mr. Litchfield was giving you
6 areas of opportunity and what you needed to do to
7 improve your performance, isn't that right?

8 A. That's correct.

9 Q. And the areas that are listed in the PIP
10 are areas that you're already supposed to be
11 performing well at in order to meet Wal-Mart's
12 expectations, isn't that right?

13 A. Always had performed very well in all of
14 them.

15 Q. Move to strike as non responsive. Could
16 you repeat the question?

17 (Whereupon, the court reporter read back the
18 previous question.)

19 A. Exactly, and I was.

20 Q. And as we've testified in conjunction
21 with this PIP you were not discharged, right?

22 A. That is correct.

23 Q. You were not demoted?

24 A. No.

25 Q. You received no decrease in pay?

25 Q. And on November 23rd you were actually

1 informed that you weren't going to be terminated, but
2 that instead you would be given a decision day and a
3 PIP, isn't that right?

4 A. That's correct.

5 Q. But still I understand your testimony to
6 be that you retired because in your mind you still
7 thought that you could be terminated, right?

8 A. I was going to be terminated, yes.

9 Q. And this letter again doesn't mention
10 discrimination of any kind, right?

11 A. That's correct.

12 Q. Doesn't mention harassment of any kind?

13 A. No.

14 Q. Did you -- and you tried to rescind this
15 resignation, isn't that right?

16 A. Yes, ma'am.

17 Q. When was that?

18 A. I have to look up the date, I'm not
19 sure.

20 Q. Was it a month after, a week after, a
21 day after?

22 A. Shortly after. I don't want to tell you
23 wrong, shortly after.

24 Q. What document would be able to refresh
25 your recollection about when you rescinded it or

1 evidence that your age played any role in any of the
2 decisions that we've discussed today?

3 A. It does.

4 MR. NANNEY: Objection.

5 THE WITNESS: I'm sorry.

6 MR. NANNEY: Go ahead.

7 A. It does because I don't know what else
8 it would be. I've gone through everything in my
9 mind, every document, my performance the way I've
10 treated people, everything, and I'm thinking what
11 could it be. There's only one thing, I'm the oldest
12 person in the market, what in the world else could it
13 be.

14 Q. Mr. Dutton, what document do you have
15 that gives any indication that any manager considered
16 your age in any employment decision regarding you?
17 Is there any document?

18 A. No, but once again I can't figure what
19 in the world else it would be.

20 Q. And you don't have any evidence from
21 anyone that Mr. Litchfield ever took your age into
22 account in any of the employment decisions that were
23 made, yes or no?

24 A. No.

25 Q. And you don't have any evidence that

1 Mr. Carmon considered your age in making whatever
2 employment decisions he made regarding you, do you?

3 A. I don't know.

4 Q. In fact, Mr. Carmon was pretty close to
5 your age, wasn't he?

6 A. I don't know his age.

7 Q. You don't have any evidence that Noah
8 Johnson considered your age in making any of the
9 decisions that he may have made regarding your
10 employment?

11 A. Everything I heard throughout that time
12 that it was going on, old guard gone, new face,
13 Wal-Mart having a new face, all's could think of I
14 even looked myself duh, what else can I can it be, my
15 performance is perfect, my evaluations up to
16 Mr. Litchfield because he didn't know me, everything
17 was perfect, how in the world else could it be
18 anything else. I couldn't with anything myself. If
19 I did I would tell you right now.

20 Q. But you -- you have no evidence tying
21 Mr. Litchfield, Mr. Binder, Mr. Carmon, Mr. Johnson
22 or anyone else who you've identified today as making
23 any of the comments that you've discussed about old
24 guard or getting rid of the old managers, that's all
25 people you don't even know who they are or they're

1 THE VIDEOGRAPHER: On the record at 5:17.

2 BY MS. SHAH:

3 Q. Mr. Dutton, did Mr. Litchfield conduct a
4 followup review to your PIP?

5 A. Yes.

6 Q. And that was on January 6th of 2010; is
7 that right?

8 A. That sounds right.

9 Q. Mark as Exhibit 43.

10 (Exhibit 43 was marked for identification.)

11 BY MS. SHAH:

12 Q. Do you recognize this document?

13 A. Yes.

14 Q. And is this that followup to your PIP?

15 A. Yes.

16 Q. And Mr. Litchfield rated you as below
17 expectations; is that right?

18 A. That is correct.

19 Q. Did Mr. Litchfield go over this with
20 you,

21 A. No, all's he mentioned was I was getting
22 marks below expectation because the outs in my store
23 which was not even on my PIP.

24 Q. I'd like to refer you to Exhibit 42, the
25 last page on Exhibit 42 which is your initial PIP.

1 A. That is correct.

2 Q. You even indicate in the second
3 paragraph towards the end it seems as though you're
4 saying that -- implying that Mr. Litchfield may have
5 been jealous or had hard feelings towards you because
6 you had applied for a market manager position, does
7 that -- am I reading that correctly?

8 A. I was approved to be a market manager by
9 the president of the company which was Lee Scott,
10 Mike Duke and Eduardo Castro-Wright. I was
11 interviewed by all three of them at Bettonville,
12 Arkansas. Then all the divisionals, there were five
13 of us got interviewed. Two of us got chosen and it
14 was not long after that then the market came open
15 where I was. I applied and all I got was a thank you
16 and pretty much that was it.

17 Q. You state that you believe that this
18 situation became known to my current market manager
19 Eric Litchfield and this was the beginning of an
20 unfavorable and hostile relationship with my market
21 team, do you see that?

22 A. I was just treated so differently. I
23 was trying to figure out every aspect, why would
24 someone be treating me like this and there again I
25 told you earlier I was trying to figure out what is

1 provoking all this.

2 Q. And so one theory you had as stated in
3 this letter is that Eric Litchfield found out that
4 you had applied to become a market manager and for
5 some reason harbored ill will towards you for that.

6 A. Could be because no one would level with
7 me what was going on, yes.

8 Q. That's as good a theory as you had as
9 any at this point?

10 MR. NANNEY: Objection, go ahead.

11 A. I'm not sure.

12 Q. What are you not sure about?

13 A. You're asking me if the -- ask me that
14 question again, if you will, please.

15 Q. This theory stated in the second
16 paragraph that Eric Litchfield began being hostile
17 towards you as a result of learning that you had
18 applied to become a market manager, you have as much
19 to support that theory as you do --

20 A. That was my assumption correct because I
21 didn't -- I couldn't figure what was going on.

22 Q. You state on the second page in the
23 second full paragraph that starts with "many of the
24 issues addressed" you state I have been accused of
25 not giving proper direction or providing leadership

1 to my associates. I fail to understand this point as
2 well as I have 75 percent of this team with more than
3 ten years in the company and you go on to talk about
4 promoting managers.

5 A. Uh-huh.

6 Q. But you previously admitted and you had
7 admitted to your own manager that you had violated
8 company policies in a couple -- at least two to three
9 areas, isn't that right?

10 A. With the sign on and the keys, yes.

11 Q. And the statement of ethics as it
12 regarded the charitable contributions issues, isn't
13 that right?

14 A. Doing contributions the same way for 17
15 years.

16 Q. But you had admitted that how it had
17 been done for 17 years had violated company policy;
18 is that right?

19 A. The way it's written, yes.

20 Q. And part of your position as a store
21 manager and being a leader is to lead by example and
22 always show compliance with all policies, right?

23 A. Yes.

24 Q. So being accused of not giving proper
25 direction or providing leadership would actually be

1 accurate in light of your admitted policy violations,
2 isn't that correct?

3 A. If you'll repeat that again, please.

4 Q. So in light of your role as a store
5 manager and being required to lead by example and
6 your admitted policy violations it would be supported
7 that you had not given proper direction or provided
8 leadership for your associates supported by your own
9 actions?

10 A. Those actions were me running the store
11 and that wasn't something that I taught, if that is
12 the question.

13 Q. But you lead by example, correct?

14 A. I most definitely lead by example.

15 Q. And so as the store manager you're
16 required to comply with company policies and show
17 associates how to comply with company policies,
18 right?

19 A. Yes, that's correct.

20 Q. And so if there were several policies
21 that you had admittedly violated it would be accurate
22 to say that you had not given proper direction and
23 you had failed to provide that leadership for your
24 associates, isn't that right?

25 A. Yes.

1 Q. Did you ever get a response from Miss
2 Hunter?

3 A. There was and she admitted to me she was
4 fairly new and I'm trying to think if I have a copy
5 or not what she sent back to me.

6 Q. If you again could --

7 A. Because I want to say then it went to
8 somebody else after her.

9 Q. You don't remember who it went to after
10 her?

11 A. It was a gentleman and I don't know --

12 Q. Tim Langley?

13 A. That may be it.

14 Q. Do you know what steps were taken to
15 investigate your letter to Miss Hunter?

16 A. No, I do not.

17 Q. And you didn't mention in your letter to
18 Miss Hunter that you felt as though you had been
19 forced to retire; is that correct?

20 A. I didn't, no, I did not.

21 Q. And you also sent an open door to
22 Eduardo Castro-Wright and Bill Simon; is that
23 correct?

24 A. That is correct.

25 Q. And you didn't complain about harassment

1 from any of your managers in those letters; is that
2 correct?

3 A. I didn't really feel that would do
4 anything, correct. That is correct? That is
5 correct.

6 Q. You didn't complain that you felt like
7 you had been forced to retire?

8 A. No. That almost sounds like a
9 complainer and I was never a complainer.

10 Q. Did Mr. --

11 A. I was just trying to make what should be
12 right, right.

13 Q. Did Mr. Simon respond to you?

14 A. He called me.

15 Q. When did he call you?

16 A. I'm trying to think, I would have to
17 look that up to see if I have that record and then
18 like I said, there wasn't much credibility after that
19 when he had mentioned to me he didn't know who
20 Mr. Litchfield was after Mr. Litchfield had mentioned
21 several times how great it was having breakfast with
22 Bill Simon on Saturdays in New Bern.

23 Q. Did you not believe Mr. Litchfield or
24 did you not believe Mr. Simon?

25 A. At that point I did not believe

1 47 -- 48.

2 (Exhibit 48 was marked for identification.)

3 BY MS. SHAH:

4 Q. Do you recognize this document?

5 A. Yes.

6 Q. And this -- what is this document?

7 A. Looks like apparently one of the people
8 that I talked to throughout this hundred year
9 investigation.

10 Q. You state on the second page towards the
11 bottom I believe that being threatened with imminent
12 termination is a form of harassment and constitutes
13 subjecting one to a hostile work environment, do you
14 see that?

15 A. And that was the second page?

16 Q. Yes, sir, paragraph number 2.

17 A. Where it starts "I believe that being."

18 Q. Yes, sir.

19 A. Yes, uh-huh.

20 Q. And you've testified today that
21 Mr. Johnson had talked to you about the writing is on
22 the wall which you took as a form of harassment.
23 What else are you contending in this litigation was
24 harassment?

25 A. Harassment that I have a bead on your

1 head.

2 Q. And that comment has nothing to do with
3 your age, correct?

4 A. I'm not sure.

5 Q. I mean nothing -- that statement could
6 equally apply to someone who is under 40, could it
7 not?

8 A. I guess it could.

9 Q. So bead on your head, the writing is on
10 the wall, what other acts do you contend were
11 harassment?

12 A. Harassment being taken out of the store.

13 Q. And again when you were taken out of the
14 store nothing regarding your age was said, correct?

15 A. That's correct.

16 Q. And you had opportunities to leave but
17 you chose not because you were afraid you would be
18 fired; is that correct?

19 A. That's exactly correct.

20 Q. So any -- what else do you claim
21 constitutes harassment?

22 A. I guess when I'm called in my office and
23 told if I talk to anybody I'm going to be
24 terminated. I mean, and me asking can someone please
25 enlighten me what is going on and just ignored, said

1 you'll be terminated if you talk to anybody. How can
2 I run the store if I can't talk to anybody.

3 Q. But they were referring to talk about
4 the investigation that you were under, were they not?

5 A. They were talking about this and that's
6 when I asked what -- can you tell me what this is so
7 I can make sure I don't take about this.

8 Q. But common sense would dictate that they
9 weren't telling you that you can't talk to associates
10 about anything, correct?

11 A. This is the terminology that was used,
12 that word can't talk about this or be terminated.

13 Q. But again it would be far fetched for
14 them to claim that you weren't allowed to speak to
15 your associates.

16 A. I thought very far fetched.

17 Q. And that day that they told you you
18 couldn't talk about this they informed you that you
19 had been the subject of an investigation, correct?

20 A. They said they were doing an
21 investigation.

22 Q. And as we discussed, it's within company
23 policy that investigations have to be kept
24 confidential, correct?

25 A. Correct.

1 Q. And so it would be -- people in an
2 investigation would be cautioned that they wouldn't
3 be allowed to talk about it for fear of discipline up
4 to and including termination, correct?

5 A. Correct.

6 Q. So aside from those four instances is
7 there anything that you contend was harassment?

8 A. Nothing more than what we've talked
9 about already today.

10 Q. What other -- we've talked about a lot
11 of things. I want to know from you --

12 A. 7 months was totally
13 threatening, demeaning, bullying. Everything we've
14 talked about today was threatening, demeaning,
15 bullying and I've never been treated like that in my
16 adult life.

17 Q. And when you say 7 months you're just
18 referring to the investigations that were done?

19 A. The investigations and leading up to me
20 get forced out because the morning of my leaving on
21 the 11th I called Tracey Battle and said Tracey,
22 being human resources I said okay, let me try another
23 person and I didn't figure I'd get anywhere and I
24 said Tracey, please tell me what I have done wrong to
25 deserve all this and she was like I don't know but

1 just keep doing those PIPs the way you're doing them
2 and at that point I knew it was done.

3 Q. But she would have known you were
4 retiring that day, right?

5 A. She -- I'll say she probably knew I
6 wanted to rescind my resignation and I'm trying to
7 recall if I shared that with her, yes, I did. I
8 shared that with her and I don't know that she made a
9 comment.

10 Q. What other instances of bullying can you
11 identify today aside from the four that you've
12 identified for me now, the writing on the wall
13 comment, the bead on your head, being taken out of
14 the store and told that you couldn't talk to do
15 people, what other instances of bullying do you
16 contend constitute your harassment claim?

17 A. The behavior when I went for my followup
18 PIP.

19 Q. What behavior?

20 A. The behavior of Mr. Litchfield.

21 Q. What did he do?

22 A. Just very arrogant.

23 Q. What did he say?

24 A. After Tracey said it was great he says
25 well, you're still below standard.

1 Q. So you disagreed with his evaluation of
2 your performance?

3 A. Yes.

4 Q. Did Mr. Litchfield say anything else
5 other than he found your performance to be below
6 expectations?

7 A. Just that it was because of my outs
8 which I did have the second lowest outs in the entire
9 market.

10 Q. Did he say anything else?

11 A. I don't believe so.

12 Q. What else do you contend constitutes the
13 bullying and harassment?

14 A. There again I guess I can say everything
15 we've talked about today from the beginning of
16 January to the day I left February 11th, the entire
17 episode throughout that time, everything. It created
18 health problems and everything else so --

19 Q. You had health problems before 2009, did
20 you not?

21 A. Not like I had in 2009, no, nothing like
22 that ever.

23 Q. So as you sit here today those are the
24 only instances that you can remember of bullying or
25 harassment?

4 A. I was not in any mental state to do
5 really anything. I don't even know if I went
6 outside. I mean, it was -- it was a bad time.

10 A. When I talked to people on the phone
11 yes. Did I write down that I'm being harassed I told
12 several people from Marlene to now that you say
13 Mr. Langley, I told them all what had occurred and
14 nothing occurred. Mr. Bill Simon, Max I'll come out
15 to the store, you know, I'll come and see, never
16 happened. Contact Mike Duke, never contacted me
17 back. Eduardo Castro-Wright never contacted me back.

19 A. I was on my own.

23 A. I don't know that I said age, but I
24 couldn't figure any other reason why I was being
25 treated like that, and yes, I was the oldest person

1 in the market.

2 Q. You also claimed that discussion in the
3 store was that Dawana Riddick, Tracey Battle and Eric
4 Litchfield had instructed associates on what to say
5 so that they could produce enough circumstantial
6 allegations to the regional vice president -- you
7 stated that the discussion heard around the store is
8 that Dawana Riddick, Tracey Battle, and Eric
9 Litchfield had instructed associates on what to say
10 so that they could produce enough circumstantial
11 allegations to the regional vice-president. Do you
12 see that on -- in paragraph 7 in the middle?

13 A. There was one of my associates that
14 overheard what was being done.

15 Q. Who was that?

16 A. That was Teresa Shanefelter.

17 Q. Did Teresa report it to anyone?

18 A. Yes.

19 Q. Who did she report it to?

20 A. She called the ethics hotline.

21 Q. Do you know when she called the ethics
22 hotline?

23 A. I do not know the date.

24 Q. What did she hear?

25 A. She was overheard telling associates

1 age discrimination because I couldn't figure what in
2 the world -- who would actually believe one person
3 making comments about a person with a 17-year career
4 that is filled with nothing but awards and accolades
5 and doing what Wal-Mart wanted me to do.

6 Q. What comments did Miss Moore make that
7 were untrue?

8 A. I don't think they were ever shared with
9 me other than from someone, two different girls that
10 she would hang it with. One ended up being Kim Grant
11 who was asset protection. The other one was Winona
12 Lightner (phonetic) who was an unachieving assistant
13 manager. They would drink beer and was overheard at
14 the place where they would drink beer together that I
15 harassed them and that was brought to me by a
16 gentleman that does -- he owns like a garden center,
17 Kitty Hawk Garden Center.

18 Q. Did any member of Wal-Mart management
19 ever physically threaten you?

20 A. Like to do bodily harm?

21 Q. Yes, threaten you --

22 A. To do bodily harm?

23 Q. Correct.

24 A. I don't believe so.

25 Q. What acts -- aside from the harassment

1 Q. And again Mr. Litchfield was new to the
2 company when he began as a market manager over your
3 market in March of 2009, correct?

4 A. Correct.

5 Q. And you never complained in writing that
6 Mr. Litchfield had harassed you unlawfully, correct?

7 A. I wasn't a complainer, no.

8 Q. Are you aware of any other associates
9 who complained about Mr. Litchfield?

10 A. No.

11 Q. I think we're about done. I just wanted
12 to ask you some questions regarding your damages, if
13 I may. What damages are you alleging that you
14 suffered in this lawsuit?

15 A. Well, definitely economic damages. You
16 know, I planned to have a long career as I look at
17 myself still as a young person and I planned to work
18 a long time, and the other parts I don't know that I
19 could even put a number on them.

20 Q. At some point in this lawsuit you'll
21 have to put a number on those non economic damages as
22 I'm understanding you to say. What would enable you
23 to value those damages?

24 MR. NANNEY: Objection, answer if you can.

25 A. I don't even know.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
EASTERN DIVISION

BRUCE BANNISTER, et al., : Civil Action No.
Plaintiff, : 4:11-CV-00094-BO
vs. :
WAL-MART STORES, INC., et al., :
Defendant. :

VOLUME II

VIDEOTAPE DEPOSITION OF MAX DUTTON

(Taken by Defendant)

Raleigh, North Carolina

Friday, May 31, 2013

Reported in Stenotype by
Marian E. Cummings, LSR
Transcript produced by computer aided transcription

1 like it's a series of questions about your education,
2 your experience, and then it goes through and kind of
3 towards the end asks you a series of questions, for
4 example, criminal convictions, how many jobs you've
5 held, that sort of thing. Do you remember responding
6 to those documents or those questions at any point
7 during the application process?

8 A. Yes.

9 Q. And do these -- as best as you can tell,
10 and if you need a minute to scan through that's fine,
11 do these accurately reflect the answers that you gave
12 on -- gave to these questions?

13 A. Pertaining to all or a particular page?

14 Q. All the questions. I mean, if
15 anything -- if you'd like a minute to look through
16 and if anything jumps out at you as incorrect, let us
17 know, but otherwise, if it was accurate, if you could
18 let me know.

19 A. Just skimming through them to the best
20 of my knowledge they're answered correctly, I guess.
21 I mean, I'm just skimming through them to best of my
22 knowledge.

23 Q. Okay. Oh, I apologize. Sorry,
24 continue.

25 A. To the best of my knowledge at this time

1 without taking probably substantial time to look
2 through them I -- you know, they're Harris Teeter
3 documents.

4 Q. And so you have no reason to question
5 the authenticity of the information contained in this
6 document?

7 A. Not at this time.

8 Q. Great, and I apologize, I didn't mark
9 this as an exhibit. I'd like to mark this as Exhibit
10 49.

11 (Exhibit 49 was marked for identification.)

12 BY MS. SHAH:

13 Q. Mr. Dutton, the last time you and I
14 spoke, you had referenced some correspondence that
15 you believed you had received from Dr. Mann regarding
16 a referral to a psychologist based on what you
17 believe he had observed as you being depressed. Do
18 you recall that testimony?

19 A. Yes, I do.

20 Q. Were you able to find that
21 correspondence since we last met?

22 A. I have not. He actually wrote a
23 prescription for me to see a psychologist and I think
24 I had it in my briefcase and I know I was not able to
25 do that at that time because I checked, my wife

1 checked, actually, with our insurance company and it
2 would not have been covered to the extent that I
3 would have needed it to be.

4 Q. Did you at any time make any effort to
5 see a medical professional or a psychologist without
6 charge or based on a patient's inability to pay?

7 A. I did not. I was just following my
8 doctor's referral or wanted to follow my doctor's
9 referral.

10 Q. Did you ever call a psychologist to see
11 if he had any programs or plans set up for patients
12 who are unable to afford his fees?

13 A. My wife being a nurse, she was handling
14 that for me. I gave her the okay to speak for me
15 since it would probably fall under the HIPAA rules or
16 laws, and she was probably a little upset with me
17 that I decided I wasn't going to do that only because
18 of what the expense would have been.

19 Q. Do you know if your wife contacted a
20 psychologist to ask about services for -- that, you
21 know, any assistance he could provide in light of
22 your inability to pay?

23 A. I don't think she asked for any
24 assistance. She just checked on exactly what it
25 would cost or how much they would -- how much my

1 insurance would cover.

2 Q. And Mr. Dutton, you've not been
3 medically diagnosed with any kind of neurosis; is
4 that correct?

5 A. Any type of what? I'm sorry.

6 Q. Neurosis.

7 A. As far as you're saying a psychological
8 condition?

9 Q. Correct.

10 A. Just Dr. Mann knowing that I was very
11 depressed.

12 Q. And that was Dr. Mann noticing that you
13 were depressed and referring you to a psychologist
14 for further evaluation and a medical diagnosis; is
15 that correct?

16 A. That is correct.

17 Q. Had you been diagnosed with any type
18 of -- and medically diagnosed, I should clarify.
19 Have you been medically diagnosed with any other type
20 of severe and disabling emotional or mental
21 condition?

22 A. No.

23 Q. And aside from what we spoke about
24 Dr. Mann, have you seen any other doctor or health
25 care provider for treatment of embarrassment,

1 humiliation, or any other mental or emotional anguish
2 that you claim was caused by Wal-Mart?

3 A. No, just Dr. Mann. I was actually too
4 embarrassed to go anywhere else.

5 Q. And so Dr. Mann is the only physician
6 that you've seen for any alleged injuries stemming
7 from the lawsuit and the actions complained of in
8 that complaint?

9 A. As far as with the condition that I'm
10 suffering from today, yes.

11 Q. What other conditions have you suffered
12 from that you believe were caused by Wal-Mart's age
13 discrimination?

14 A. The age discrimination probably just
15 emotional distress, and as much as I hate to say
16 because I'm not like that, anger and --

17 Q. Have you ever been diagnosed with any
18 previous mental or emotional conditions before this
19 lawsuit ever arose?

20 A. No.

21 Q. At any time?

22 A. No, I have not.

23 Q. Have you ever seen a psychiatrist,
24 psychologist or counselor before your resignation
25 from Wal-Mart?

1 Q. Sorry. And can you hear me okay?

2 A. Yes, let me just listen very closely.

3 Q. Have you -- the last time we spoke, you
4 were going to review your records to see the amount
5 of any out-of-pockets costs for medical services that
6 you've had since leaving Wal-Mart and so what I was
7 asking is have you been able to reach a determination
8 as to how much out-of-pocket costs you've expended
9 for medical services since you left Wal-Mart?

10 A. No, I do not have that figure.

11 Q. Have you been prescribed at any point in
12 your lifetime any type of antidepressant medication?

13 A. I believe Dr. Mann prescribed something
14 for me one time telling me I needed to relax a little
15 bit more.

16 Q. Do you remember what medication that
17 was?

18 A. I want to say it was Ativan and I did
19 not like taking it; it made me entirely too tired.

20 Q. And Dr. Mann prescribed you Ativan, do
21 you remember when that was?

22 A. No, I don't because once again, I did
23 not like taking it.

24 Q. I'd like to mark as Exhibit 50 the
25 records relating to Dr. Mann, so that would begin at

1 Mann 195 and the last one in the stack I believe
2 would be 305, and that should be about ten pages.

3 (Exhibit 50 was marked for identification.)

4 BY MS. SHAH:

5 Q. Mr. Dutton, have you seen these
6 documents before that have been marked as Exhibit 50?

7 A. Yes.

8 Q. What are these documents?

9 A. It looks like prescriptions written from
10 my doctor.

11 Q. And that doctor is Dr. Mann; is that
12 correct?

13 A. That is correct.

14 Q. And is it accurate to say that these
15 prescriptions span a period of from 1996 to about
16 2004?

17 A. Yes.

18 Q. And these prescriptions concern
19 prescriptions for the drug Ativan, Restoril, Xanax,
20 Clonazepam and Ambien; is that correct?

21 A. Yes.

22 Q. And those are used to treat -- what was
23 your understanding of what those drugs were used to
24 treat for you?

25 A. He was trying to help me get some better

1 rest at night. I didn't -- I would have restful
2 nights and I wouldn't have restful nights back in
3 this time frame.

4 Q. And some of these are anti-anxiety
5 medications as well; is that correct?

6 A. All's I recall he was trying to make --
7 trying to ensure I was getting a good night's sleep.
8 I would only take it before bedtime.

9 Q. And you had been diagnosed with sleep
10 apnea in 2007; is that right?

11 A. Yes, uh-huh.

12 Q. So that -- it's your testimony that
13 that's what these were to combat?

14 A. Yes.

15 Q. Aside from these medications, have you
16 been prescribed any type of anti-anxiety medication
17 at any time?

18 A. No.

19 Q. Do you have any plans to see any
20 psychologist, psychologist, counselor or any other
21 doctor regarding your alleged depression at any time
22 in the future?

23 A. Yes, I know I need to.

24 Q. Have you selected a physician or
25 psychologist or psychiatrist or counselor?

